

# TOBACCO-RELATED ILLNESSES AND VA COMPENSATION

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## HEARING BEFORE THE COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE ONE HUNDRED FIFTH CONGRESS SECOND SESSION

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MARCH 31, 1998

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# CONTENTS

MARCH 31, 1998

	Page
Tobacco Related Illnesses and VA Compensation .....	1

## STATEMENTS BY COMMITTEE MEMBERS

Chairman Arlen Specter .....	1
Prepared statement of Chairman Specter .....	33
Senator Daniel K. Akaka .....	36
Senator Ben Nighthorse Campbell .....	5
Senator Larry E. Craig .....	8
Senator Y. Tim Hutchinson .....	7
Senator John D. Rockefeller IV .....	2
Senator Strom Thurmond .....	4
Prepared statement of Senator Thurmond .....	34
Senator Paul Wellstone .....	6

## WITNESSES

Burns, Chuck, National Service Director, AMVETS .....	72
Endicott, Hon. James, Former General Counsel, U.S. Department of Veterans Affairs .....	40
Gorman, David, Executive Director, Disabled American Veterans .....	21
Prepared statement of Mr. Gorman .....	52
Mansfield, Gordon H., Executive Director, Paralyzed Veterans of America .....	23
Prepared statement of Mr. Mansfield .....	62
Russo, William F., Director, Veterans Benefits Program, Vietnam Veterans of America .....	25
Prepared statement of Mr. Russo .....	67
Steadman, Kenneth A., Executive Director, Veterans of Foreign Wars .....	24
Prepared statement of Mr. Steadman .....	65
West, Hon. Togo D., Jr., Acting Secretary, U.S. Department of Veterans Affairs, accompanied by Hon. Joseph Thompson, Under Secretary for Benefits, U.S. Department of Veterans Affairs .....	28
Prepared statement of Secretary West .....	37
Wilkerson, Phil, Deputy Director for Operations, American Legion .....	19
Prepared statement of Mr. Wilkerson .....	43

## APPENDIX

Prepared statements of Committee members .....	33
Prepared statements of witnesses .....	37

# **TOBACCO RELATED ILLNESSES AND VA COMPENSATION**

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**TUESDAY, MARCH 31, 1998**

U.S. SENATE  
COMMITTEE ON VETERANS' AFFAIRS  
*Washington, DC*

The Committee met, pursuant to notice, at 2:20 p.m. in room SR-418, Russell Senate Office Building, Hon. Arlen Specter [Chairman of the Committee] presiding.

Present: Senators Specter, Thurmond, Jeffords, Campbell, Craig, Hutchinson, Rockefeller, Graham, Akaka, and Wellstone.

## **OPENING STATEMENT OF CHAIRMAN SPECTER**

Chairman SPECTER. Good morning. The hearing of the Veterans' Affairs Committee will now proceed.

Our subject today involves the issue of the responsibility of the Federal Government for illness, disease, medical problems effected with the use of tobacco. It is a highly controversial subject because there has been an allocation made of some \$17 billion, or \$10.5 billion if you accept the figures of the Congressional Budget Office, for this item in the Veterans Affairs budget and, in an era where there is a search for every last dollar for some other purpose, an effort is being made to allocate that fund to other Federal purposes.

We have had the opinion of the General Counsel of the Department of Veterans Affairs that nicotine is addictive and that, in the broad range of ailments which come to servicemen and women, it is compensable because smoking is not a willful misconduct. We do know as a practical matter that when young men and young women are taken far from home, under very tense circumstances, with the availability of cigarettes sometimes free and sometimes at reduced cost, and that they may smoked and smoked in large quantum, much more so than others in less tense situations.

The VA's budget is very low compared to other budgets in the Federal Government. If these funds are not to be directed to ailments

connected with the use of tobacco, then it is my view that they ought to be a part of the Veterans budget generally for many other needs which are very urgent.

A longer statement will be made a part of the record, without objection, but that is a brief overview as to my approach to the issue.

[The prepared statement of Chairman Specter appears on page 33.]

Chairman SPECTER. I would like to yield now to our distinguished Ranking Member, Senator Rockefeller.

### **OPENING STATEMENT OF SENATOR ROCKEFELLER**

Senator ROCKEFELLER. Thank you, Mr. Chairman, very much. Our views are very similar on this matter. This issue of protecting veterans' right to compensation for disabilities resulting from tobacco use, as it has been handled, makes me very angry and very disappointed.

Simply stated, the administration and the Budget Committee have made a midnight raid on veterans' funds and, frankly, on the authority of this Committee—people sometimes don't pay much attention to authorizing Committees, but it's not the intention of those on authorizing Committees to be taken lightly. By doing so, they have made a midnight raid on our Nation's veterans. I intend to fight all of this on the Senate floor as best as I can. But as you know, there are powerful forces who want to see veterans' funds used as a cash cow for roads and for other things which do not benefit veterans.

I have several things I want to say, Mr. Chairman, to explain where we are in this fight.

First, I want to thank the three VA General Counsels who appear here today for their very courageous work. Considering the political pressures I know they must have faced, it was not easy for each of them to issue opinions that they knew would be opposed by their political superiors, and I applaud each of you.

Others have been far less courageous. Earlier this month, the Senate Budget Committee approved its resolution assuming a \$10.5 billion cut in veterans' funds and used them to partially fund the large increase in ISTEA. Usually, under the budget law, cuts like this must be fully aired and debated as part of what we call the reconciliation process. But not this year. Not only did the Budget Committee make this raid on veterans' compensation, but under this year's budget resolution, the Veterans' Committee's jurisdiction over compensation matters has been totally undermined.

In my view, this type of gimmickry makes a mockery not only of our budget process, but of the Rules of the Senate. If permitted to

stand, no authorizing Committee can assume that it has sole jurisdiction over its programs, based upon what some are now doing.

When the administration made their proposal, it said the cost savings were \$17 billion, based on an estimate that some 500,000 veterans would file tobacco-related claims each year. There is simply no reasonable basis for this guess. The reality is that a total of only about 7,000 veterans have filed claims over 6 years, and only 278 have been able to prove their addiction and disability to VA's satisfaction and have been granted compensation. Both the CBO and the OMB should be embarrassed by their work on this issue.

Under the law, VA is generally required to pay disability compensation for any injuries, diseases, or conditions that are connected with service in the military—they need not be combat related. In keeping with this, since 1993, both Republican and Democratic administrations have interpreted the law to require payment of disability compensation to veterans who could prove that they became addicted to tobacco while in military service if that condition continued and resulted in a disability.

This is a very, very tough test to meet. In my view, that is why so few claims have been filed. Veterans and their representatives know that this is a tough law.

It is also important to understand that the military now acknowledges the role it played in fostering addiction by supplying free and reduced cost tobacco products to servicemembers and by other activities.

I am aware that some view tobacco use as solely a matter of personal choice, although such a view is inconsistent with our current direction of moving to rein in the tobacco industry because of the way it has manipulated tobacco products to foster smoking addiction. Nevertheless, I believe that our veterans are entitled to their day in court so that they may have an opportunity to prove their case. Whether or not a veteran became addicted in service and the results of that addiction are issues that the VA has correctly decided should be determined by its triers of fact.

Even if one opposes paying such compensation to veterans, it is outrageous, as the Chairman has said, that savings from veterans' programs would be moved away from funding other underfunded veterans' needs, particularly in health care, and be used instead to fund any other program, such as roads or tax cuts.

In closing, I acknowledge that there is room for change and belt-tightening in all areas, as there always is, including veterans' programs. That is exactly why veterans have been willing to do their part and have fully participated in cuts to reach a balanced budget. But if we cut veterans' programs in the way now proposed, we will be

justifiably criticized for paying for other programs at the expense of American veterans, and I will not participate in such a process. Thank you, Mr. Chairman.

[Applause.]

Chairman SPECTER. Thank you very much, Senator Rockefeller. We now turn to the senior Senator of all, Senator Thurmond.

### **OPENING STATEMENT OF SENATOR THURMOND**

Senator THURMOND. Thank you very much, Mr. Chairman. It is a pleasure to be here today to consider the question of compensation for tobacco related disabilities and related issues.

This is a matter of great concern to me and I know to you as well. I join you in welcoming our distinguished witnesses, Acting Secretary of Veterans Affairs Togo West, other current and former officials of the Department of Veterans Affairs, and representatives of the veterans service organizations.

Like other elements of the tobacco debate, Mr. Chairman, this issue is complex. The memoranda of the Department of Veterans Affairs over the past few years illustrate the complexity. The original opinion of the General Counsel issued January 1993 held that while the determination of nicotine dependence may be considered a disease, it is an adjudicated matter to be resolved based on accepted medical principles. Yet, as recently as last May, the Under Secretary of Health stated his supposition that nicotine dependence may be considered a disease but raised many questions as to when a person becomes dependent.

In June 1997, the Director of the Compensation and Pension Service expressed concerns about the lack of clear policy guidelines regarding nicotine dependence. Other issues regarding compensation raise similar questions. Ambiguity exists on the question of determining service connection. Questions remain within the VA on how to determine whether nicotine dependence arising during service may be considered the approximate cause of disability occurring after service.

The point is, Mr. Chairman, that even after five years of discussion within the Department of Veterans Affairs, they appear to be uncentered on how adjudication personnel ought to proceed. I hope the witnesses will clarify these medical and legal principles.

Beyond the issue of compensation, Mr. Chairman, are questions and concerns regarding the budgetary impacts of the President's budget request. I am concerned that the President's proposed legislation denies compensation to veterans without first resolving within his own Administration the issues I've previously outlined.

Nevertheless, the Administration did forward a proposal to deny compensation and use these savings for nonveteran purposes.

A second level of concern is the use of savings in the mandatory accounts to offset increases in discretionary spending. This appears to be a backdoor method to avoid the spending caps negotiated in last year's Balanced Budget agreement.

In conclusion, Mr. Chairman, I again thank you for holding this hearing and for your good work in connection with it to shed the light on some of these concerns. We must act with care and deliberation as we consider the medical evidence, legal issues, policy concerns, and budgetary impacts of this matter. Furthermore, I believe we must examine this issue in the context of the broader issues raised by proposed tobacco settlement legislation.

I thank Acting Secretary West and the other witnesses for their testimony today. I look forward to reviewing the record and working with you to make sure our veterans are treated fairly and honorably.

Thank you very much.

[The prepared statement of Senator Thurmond appears on page 34.]

Chairman SPECTER. Thank you very much, Senator Thurmond.

Senator Campbell, would you care to make a brief opening statement?

### **OPENING STATEMENT OF SENATOR CAMPBELL**

Senator CAMPBELL. Yes, thank you, Mr. Chairman. I certainly want to associate myself with the remarks of Senator Rockefeller. I think that this is outrageous, very frankly.

I know we have numbers we can go through from CBO on how much it's going to save or be transferred and all that. But frankly, I think one of the problems we face in Washington is that we have fewer and fewer people here who served who care about veterans, with the exception of possibly this Committee and the ones who have been in the service themselves. It just amazes me that there's this movement now to sort of throw them overboard, throw the vets off the "Ship of Good Health."

I was in the service, as were many Members here, like Senator Thurmond, and I can remember very clearly we were told "smoke 'em if you've got 'em." In fact, I did for a while smoke in the service but quit and haven't smoked since. But the environment then was that they encouraged you to smoke. There was no label on the package saying don't smoke. There was no counseling by anybody telling you what the health hazards were if you smoked. We were encouraged to do it. I know young soldiers going in now may understand the risks a little better.



But for the Administration to imply that there was some kind of willful misconduct on the part of the soldiers in those days because they smoked, as if it was some kind of willful drug abuse, I think it's just an outrageous statement to make. I want to tell Senator Rockefeller that when we do battle on the floor of the Senate, I'm going to be with you side by side. They are simply not going to shove this down the veterans' throats if we can help it.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much Senator Campbell.  
Senator Wellstone?

### **OPENING STATEMENT OF SENATOR WELLSTONE**

Senator WELLSTONE. Thank you, Mr. Chairman.

I really like what I hear from all of us on this Committee. It seems to me, Mr. Chairman, there are two different issues. One is whether or not there ought to be the compensation for the veterans directly. And I think I would add to the equation I think the Government ought to also go after the tobacco companies to have them pay for this, which I think that should be part of the equation. And then the second thing, which I just heard from Senator Ben Nighthorse Campbell, from the Chair, from Senator Rockefeller, Senator Thurmond, I think the second thing that is just almost a bit too much to take from the point of view of the veterans community—and I'm not trying to play to people that are here today, I mean it sincerely—is that if, in fact, the compensation isn't going to go directly to veterans, then, for gosh sake or for God's sake, then this money ought to be at least invested into the veterans health care system at the very minimum. That really I think is kind of what makes things go from bad to worse.

I will just conclude with the obvious. All of us have got bills, I've got a veterans health care bill. I think it would be great if all of us were out on the floor together. I think we all ought to be out there at the same time on these amendments. But we've got a third of the homeless are veterans, many of those veterans are struggling with chemical dependency or struggling with PTSD; we've got an ever-aging veteran population; and I've been working on an issue, Mr. Chairman, for ever and ever and ever and I wonder whether or not it will ever change, these atomic veterans are still waiting for compensation. I can't think of a group of veterans that has been more mistreated.

In any case, take the whole picture and we've got a lot to do by way of really having a really good health care system for veterans.

It seems to me that this is outrageous. I think this Committee collectively has indignation about it and I think we're all going to be

fighting very hard together both on this budget resolution and appropriations. I guess my appeal to you is to make sure that rather than somebody goes out on an amendment and then kind of we hear about it, let's go out there together and make this fight.

Chairman SPECTER. Thanks very much, Senator Wellstone.

We have circulated a Dear Colleague letter on action before the Budget Committee. I hope everybody will sign on from the Committee and beyond.

Senator Hutchinson?

### **OPENING STATEMENT OF SENATOR HUTCHINSON**

Senator HUTCHINSON. Thank you, Mr. Chairman. I will be very brief. I want to thank you for calling this hearing.

I think the issues that we confront are critically important to veterans, are critically important to the budget process, and to the future of how we deal with our veterans. So I also would associate myself with the remarks of the Chairman and Senator Rockefeller.

I think the rationale that the Administration has used for seeking to bar compensation needs to be closely questioned and investigated. The attitude that this was willful misconduct I think is truly offensive to every member of this Committee as it is offensive to our veterans service organizations and the veterans across this country.

I think we need to investigate. I don't know whether today's hearing is the appropriate one, whether we're going to have the information provided today that we need on how the Administration arrived at what they're projecting the savings would be. I think they are wildly exaggerated. We need some very clear data. The differences between OMB and CBO, I think there's a lot more that needs to be presented to this Committee concerning the savings that have been projected.

And how in the world we could justify taking those savings, whatever they might be, and putting those into highways—and I'm probably apart from Senator Byrd one of the biggest supporters of infrastructure, and I think we as a body this year believe strongly that we've got to make a greater investment in our infrastructure—but the offsets to come on the backs of veterans in this way I think is intolerable. There have to be other offsets to pay for ISTEA. I think this is an area that the Committee is very united on and that we need to take a committed stand on.

Let me thank the witnesses for coming. I hope at some point, Dr. Kizer is not here today, Acting Secretary West will assist us in getting the answers to the very important questions that confront this Committee. I thank the Chairman for calling the hearing today.

Chairman SPECTER. Thank you Senator Hutchinson.

Senator Craig?

**OPENING STATEMENT OF SENATOR CRAIG**

Senator CRAIG. Mr. Chairman, thank you. I apologize for getting here late. I wish I had heard your opening statement and the Ranking Member's.

Let me say that I'm not sure I agree, and I may be the first on this Committee to say that before this hearing. I'm not sure that we ought to decide that it was the fault of Government in this instance that promoting smoking was true for veterans. I know that veterans have a smoking problem and that we're going to have to deal with it.

I also know that if we are to argue that tobacco companies ought to pay for this, then maybe we ought to argue that for all the alcoholics that are in our veterans community as a result of the culture of drinking within the Armed Services, and that I think can be argued to be somewhat true, that maybe the alcohol companies ought to pay for that.

What I would suggest is that we have responsibility to take care of our veterans. And I would suggest that we can do that through subvention and that we ought to put the receipts, if there are any to come from the tobacco settlement, into Medicare and make sure that our veterans are served inside their veterans facilities and that that is paid for through subvention. I think we accomplish the same thing and I think we do it in the appropriate way that is consistent with the changes we are making in the administration of the veterans system, in its hospitals, in its downsizing, and the benefits, and all of those kinds of things.

So I'm not sure I'll agree with you. I'm not sure we understand the full impact of this either. I have spoken to the Chairman, it's no secret that I may disagree with his amendment on the floor and I may offer a second degree that we look at the study of this. I also agree that I am willing to protect the budget authority of this Committee and Veterans' budgets; I won't argue that. But I would argue that I think the judgment that brings us here may have been misplaced.

Everybody is piling on right now to a pot of gold they think may exist. It may not exist. And if it does, and I hope there can be benefits, then I hope we put them into Medicare, strengthen Medicare, and make sure that all of our veterans can gain access to the veterans' health care systems, if they choose, for whatever reason through Medicare if it's nonservice-connected. I'm not sure that I can argue that smoking is service-connected any stronger than I could argue that drinking is service-connected. I can argue that they are voluntarily a product of the individual's own action.

With that, I'm going to work with you to resolve this issue. But I'm not sure that we resolve it based on the current criteria.

Chairman SPECTER. Thank you very much, Senator Craig.

I did not mention the pot of gold from the tobacco settlement because that could be a large pie but that pie is still in the sky and it may stay in the sky.

Senator CRAIG. Exactly.

Chairman SPECTER. If we do realize those funds, I do believe the Department of Veterans Affairs would have a high calling on them. Subvention of Medicare may be part of the answer, but part of the problem rests with people who are not under Medicare.

We have the witnesses here today. I have talked to the distinguished group here and they do not have opening statements. We have a very long list of witnesses, so we're going to go right to questions with five minute rounds in an effort to conclude this hearing, if at all possible, by 11:45. We will have an interrupted vote here in just a few moments.

But I will begin my five minute round, Judge Endicott, by asking you about the learned opinion which you handed down which made a finding that addiction was a disease. There is substantial medical evidence on that point. Finally, after tortuous litigation and rummaging through the files of the tobacco companies, we have finally found that the tobacco companies acknowledge that nicotine is addictive and have tried to conceal it in their own files for a long time, and that within the gambit of coverage of a disability on illnesses related to the use of tobacco, the opinion which you handed down is still of law. I might add that there was an effort last November by the Administration to have some hurry up legislation to eliminate that obligation which this Committee resisted, and refused to go along with.

Now, we want to turn to the legal experts and the medical experts on precisely what the situation is. So would you summarize, Judge Endicott, the findings of your opinion which says that the Department of Veterans Affairs is responsible for injuries connected to the use of tobacco.

Mr. ENDICOTT. Thank you, Mr. Chairman. In a very brief historical context, this opinion was written at a point where the VA was becoming very tough on smoking. Secretary Derwinski had stopped smoking in all our VA facilities, he had stopped it in the hospitals and medical facilities. He later had to relent some to allow hospitalized veterans to smoke if they chose to do so. And if I had a concern at the time on this opinion, it was that—did it look like the VA was starting to soften its stance against smoking.

The opinion came up through the board requesting some clarification. I think the essence of it at the time was essentially is cigarette smoking, per se, misconduct which would have denied benefits. I think the conclusion was clear that no, it wasn't, that it is legal and lawful to smoke. On the issue of the disease or disability aspect of it, I think at the time the medical knowledge was there could be an addictive disorder.

Our opinion basically went back and said that if proper medical facts were developed in the adjudication process, then one could conclude that cigarette relating disabilities could be the subject of disability compensation. I don't think the opinion said that it had to be, I think it said there are facts that have to be developed. And I felt at least that this gave a roadmap to the Under Secretary for Benefits to go back and develop adjudicative guidelines that these cases could have been resolved.

Chairman SPECTER. And when you say facts to be developed, would you specify what those facts would be which would lead to compensation?

Mr. ENDICOTT. Well, sir, I think clearly there had to be a nexus or connection between smoking while in the military or was your service aggravating. In other words, as a veteran who smoked before he entered service, did he have stressful duty where the cigarettes provided that sort of thing that may have aggravated his condition.

Chairman SPECTER. Is there any duty in the military which is not stressful?

Mr. ENDICOTT. Well, sir, I think you might look at the three war veteran who has served many overseas tours versus someone who might have served two years in a relatively calm continental United States assignment.

Chairman SPECTER. Away from home, very frequently drafted, not near family, not near friends, totally new surroundings.

Mr. ENDICOTT. Yes, sir. The biggest question, of course, is the further you get from your military service, what factors could you look at. I think very legitimately you could look at 10, 12, 20 years of intervening civilian life where you were away from those stressors, would those then justify those disabilities.

Chairman SPECTER. And if the nicotine addiction came during the service and it was continued smoking after the service, then what?

Mr. ENDICOTT. You would have to look at what the veteran did in his civilian life. Did the veteran stop smoking, for example. Was he cautioned by his medical people to stop.

Chairman SPECTER. So it would be an individual matter. Adjudication on the facts of each case but liability is possible.

Let me move to Dr. Garthwaite for just a moment, before my red light goes on, as to the lower number of veterans who have made claims, contradicting the assertions that the sky is going to fall. What have you found, Dr. Garthwaite, in your position as Deputy Under Secretary for Health of the Department of Veterans Affairs?

Dr. GARTHWAITE. Your question is why have not more veterans made claims?

Chairman SPECTER. Well, how many veterans have made claims, and isn't it a manageable universe.

Dr. GARTHWAITE. At the current time, I think it's a manageable universe. The concern though is that a large proportion of veterans have smoked and that once payments begin to be made and the distinction is made clear, and as veterans service organizations and others inform their membership, I do think there's reason to believe that additional veterans will make claims.

Chairman SPECTER. More people might understand their rights and seek to take advantage of their rights? That's a good solid American tradition.

Dr. GARTHWAITE. I also think that the clarification that it wasn't just the smoking for the period of time in the service that then had to be tied to your current medical condition, but, in fact, the development of the nicotine dependence which developed in the service which now could ultimately result in severe medical disease.

Chairman SPECTER. So the nicotine dependence developed in the time of service could be the causal factor leading to later smoking?

Dr. GARTHWAITE. Right. And that's a recent opinion.

Chairman SPECTER. I want to introduce our other two distinguished panelists, John Thompson, Acting General Counsel for the Department of Veterans Affairs, and Ms. Mary Lou Keener, former General Counsel for the VA.

Senator Rockefeller?

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Judge Endicott, when you issued your opinion on all of this in 1993, you did not create any new law or confirm any new benefit on veterans. In fact, you were interpreting VA's existing law. Am I correct about that?

Mr. ENDICOTT. That's correct, sir.

Senator ROCKEFELLER. Again, assuming the test for compensation was as you say it was, following your 1993 opinion, under what legal authority could the Secretary halt the adjudication of claims?

Mr. ENDICOTT. Senator, I left in 1993. I'm really not familiar with what the internal thought process was on why. I know in March of 1993 there was a hold put on the adjudication. I'm not really familiar with the thought process on why the hold was placed.

Senator ROCKEFELLER. Ms. Keener, can you answer that question?

Ms. KEENER. To the best of my recollection, Senator, I am not familiar with a hold being put on the adjudication of claims. As I recall, there were several approaches being considered about how to adjudicate these claims. Everyone felt it was extremely important to issue clear guidelines to the field before the adjudicators looked at the claims. We looked at different approaches. New regulations regarding the adjudication of these claims was one approach that we looked at. I do recall that the Secretary at that time—

Senator ROCKEFELLER. Ms. Keener, that actually wasn't my question. My question was, is there a legal authority that the Secretary could use—I'm not talking about history—is there authority that they could use to halt adjudications?

Ms. KEENER. I'm not familiar with that. I'm going to defer to Jack, but my answer is that I don't think that's what actually happened. I think that what happened is there was a process that was looked at as to how to go about adjudicating these claims, that guidelines were being developed, rather than an actual halt occurring. But I'll let Jack answer specifically.

Senator ROCKEFELLER. Can you answer that question, Mr. Thompson?

Mr. THOMPSON. Senator, my office advised the Veterans Benefits Administration in this and other instances that Section 503 of Title 38 authorizes the Secretary to prescribe such rules and regulations as are necessary and appropriate to carry out the benefits laws. When it is determined that there is a need for such rules and regulations, we have counseled that it is permissible to defer adjudications until those necessary rules are in place. To my knowledge, that's the legal basis for the moratorium on claims processing.

Senator ROCKEFELLER. Ms. Keener, could you just tell me as best you can the exact test or criteria that a veteran was required to meet under your General Counsel opinion?

Ms. KEENER. Yes, sir. Initially, when we were asked to answer the question whether or not secondary service connection could result from nicotine dependence, we became aware that the whole question of whether nicotine dependence was a disease or not was really a medical issue that needed to be answered by our medical people. So we asked Dr. Kizer to give us an opinion whether or not nicotine dependence was a disease.

Once we got his opinion indicating that nicotine dependence may be considered a disease, we issued the guidelines for adjudication; first, assuming that nicotine dependence is a disease, you must next

determine whether or not that nicotine dependence was actually acquired in service. If you find that it was acquired in service, the third question that has to be asked is whether or not that nicotine dependence was the proximate result of the disease that was claimed for compensation. It was a relatively simple three-step process from a legal perspective.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Rockefeller.

We are in the midst of a vote. We will recess for just a few minutes to go vote and we will return right away.

[Recess.]

Senator ROCKEFELLER [assuming Chair]. The subway broke down. Made in Canada.

Mr. Thompson, I wonder if you could explain to me the authority and the limitations on VA's ability to sue the tobacco companies to recover its costs associated with tobacco-related illnesses.

Mr. THOMPSON. The Federal Medical Care Recovery Act authorizes Government agencies to sue, in tort, third parties who injure individuals for whom the Government must provide health care. That authority with respect to VA—

Senator ROCKEFELLER. So health care, but not compensation?

Mr. THOMPSON. That's correct. And there's an exception. VA cannot sue to recover costs of providing care for service-connected disabilities. But as your follow up question evinced, there is no authority for the Government to sue to recover its compensation costs.

Senator ROCKEFELLER. Thank you. Dr. Garthwaite, apart from the issue of veterans, please tell me what the latest medical thinking is regarding smoking and addiction. Are some people more prone to addiction to nicotine than others are? What is the current state of medical knowledge on this?

Dr. GARTHWAITE. I'm not aware of clear studies that have looked at predisposition of individuals to nicotine. I think there is some interesting data in other kinds of dependencies—alcohol, for instance—that there may be genetic predispositions. I would be happy to do some more scientific review of the literature about that specific question and get back to you on that to see if there are any things that I'm not aware of. I don't peruse that literature frequently nor did I do that specifically for this hearing.

But I think there would be precedent for the fact that certain individuals would be more prone to certain types of addiction if what we know in other addictive disorders holds true for nicotine.

[Subsequently, the Department of Veterans Affairs provided the following information:



*The 1988 Surgeon General's landmark report on Nicotine Addiction addressed the issue of predisposition as follows: "The concept of a predisposition to drug dependence arose from the observation that not all people are equally prone to becoming behaviorally dependent on drugs (references cited). The multiple sources of differences in predisposition or vulnerability to drug dependence are not mutually exclusive. One is a genetic predisposition shared by family members by virtue of their common biologic heritage. Another is an experiential predisposition, shared by family members by virtue of their shared life experiences. For instance, children with parents who are dependent on drugs are at elevated risk of becoming dependent (references cited). For tobacco, the magnitude of the effect is greater when both parents smoke than when only one parent smokes (three references cited). Other types of vulnerability factors are physiologic (e.g., pain, sleep deprivation) and psychiatric (e.g., anxiety, depression) conditions that may constitute undesirable states for which relief is sought by use of a drug. Finally, a variety of non-pharmacologic factors are important in the initiation and development of drug dependence (e.g., price, availability)."*

*This is still an excellent summary of current understanding of the complex factors, including genetic and cultural factors, operating to determine if any individual exposed to tobacco smoking and nicotine will become addicted.]*

Senator ROCKEFELLER. OK. According to information gathered by VA's own prevention indices, VA is already doing an incredible job of reaching veterans who smoke. According to a letter I received from Dr. Kizer quoting prevention indices, 86 percent of VA patients received tobacco screening, and nearly 80 percent received counseling. In view of that, then why would you propose contracting out such a program?

Dr. GARTHWAITE. My understanding of that proposal is that it would not only target those individuals who were currently users of the system, but would look at the broader issue of those who are currently not using the system but might use it into the future, and whom, if we could get them to discontinue their smoking, would decrease our overall potential to have those as patients, which is our

ultimate goal. Meaning that they are not patients because they're not getting sick.

Senator ROCKEFELLER. But the VA seems to have a program that is being effective.

Dr. GARTHWAITE. Yes. I think for the patients that are currently seeking care from us that we're aggressively attempting to identify smokers, to counsel them, and to offer to them various treatment programs that have at least some proven effectiveness.

Senator ROCKEFELLER. Again, as to proposed cessation programs. What percent of those veterans that we have been talking about who received counseling, to the best of your knowledge, actually stopped smoking? And wouldn't you agree that quitting smoking is the true measure of success?

Dr. GARTHWAITE. I do agree with that. I think our data are relatively similar to more broadly published data. About 25 percent of people who successfully quit are able to do that on their first attempt; others have to go on and have subsequent attempts. Eventually, about 45 percent of those who have ever smoked stop smoking.

Senator ROCKEFELLER. Wouldn't you agree that the Department of Veterans Affairs could use more health-related funding?

Dr. GARTHWAITE. Well, we're team players and we attempt to utilize whatever budget that we're given to provide as much health care to as many veterans as possible. I think we've made significant strides in that regard over the last several years and we'll continue to try to spend as effectively, efficiently as we can any amount of money that we're given.

Senator ROCKEFELLER. The record will note that you behaved properly. [Laughter.]

I have some problems with VA's estimate about the number of veterans who will file compensation claims for smoking-related disabilities. But there is no question that VA has spent, and is spending, a tremendous amount of resources on tobacco-related health care. VA has proposed cutting compensation, but has not been vocal about being reimbursed from a global tobacco settlement for its health care costs. In view of the cutting, why is that?

Dr. GARTHWAITE. We're part of a larger view and strategy I think with regards to tobacco legislation. Our costs are significant in terms of the care we render to the veterans with regards to the health effects.

Senator ROCKEFELLER. Dr. Garthwaite, I wish I didn't have to put you on the spot, but I sort of have to. I understand who you work for and I understand who I work for, but it is awkward when virtually every single hearing that we've had has talked about the need for

more money for VA health care. One of the things, for example, that's tremendously needed is research. The importance of research is that research allows the VA to bring in really top-flight specialists who are known, and that, in turn, encourages others, and the whole momentum of VA health is helped.

So the concept of just handing back \$10 billion that could be used on health care has a certain jarring note, doesn't it?

Dr. GARTHWAITE. I think that if we were to be handed additional dollars for our VA health care, we would be more than happy to spend that very effectively and efficiently on better care to additional veterans.

Senator ROCKEFELLER. That was the answer I was looking for. Thank you, sir.

Chairman SPECTER [resuming Chair]. Thank you very much, Senator Rockefeller. That was the answer I was looking for, too. So I don't have to ask the question.

Senator Jeffords?

Senator JEFFORDS. Mr. Chairman, I arrived here late. I will defer to your asking further questions yourself or Mr. Hutchinson.

Chairman SPECTER. Senator Hutchinson?

Senator HUTCHINSON. Thank you, Mr. Chairman. Only one question.

It is my understanding that when Secretary Brown made his decision to halt compensation payments back in 1993 and place a moratorium on the tobacco compensation payments at that time that there were 6,000 disability claims that had already been filed at that point. My question is, have they been adjudicated? Are they in limbo? What is the status of those 6,000 disability claims by veterans that had been filed prior to the moratorium?

Mr. THOMPSON. Yes, Senator. I believe 6,000 was the total that accumulated over the course of the entire processing moratorium. When claims processing was resumed this past July, work began to attack that backlog. I don't have statistics right before me as to how far along they've gotten in adjudicating those claims. Perhaps the other Mr. Thompson who will appear on the next panel, the Under Secretary for Benefits, has that information.

I might point out that although those claims were in the queue, some of them for two or three years, if it is established that benefit eligibility exists, payments relate back to the date of claim. Retroactive benefits are to be paid back to the initial date of claim so that individuals get the full measure of benefits regardless of how long their claims were in the queue.

Senator HUTCHINSON. Okay. In 1995, it's my understanding that the Department considered actually implementing regulations to

restrict compensation for tobacco claims. Were those regulations ever actually issued and implemented?

Mr. THOMPSON. No, they were not, Senator. In 1995 an effort was made, as Ms. Keener indicated earlier, to provide guidance to the field in the form of rules that would bring some measure of uniformity to the regional offices' approach to adjudication. That was prior to the 1997 opinion which said that the Government may be liable for even post-service smoking if the individual's nicotine dependence began in service.

And so the emphasis in the 1995 period was on how best to adjudicate claims that the smoking in service itself caused post-service disease. Various formulations were considered, one of which would have been that if half of the individual's smoking occurred during service, that would be a threshold level for the claim's allowance. Formulations such as that were presented to former Secretary Brown in November of 1996, but he wasn't comfortable with those approaches. Essentially, he told adjudication staff that additional regulations weren't needed, to just go ahead and process the claims under existing law and regulations.

Senator HUTCHINSON. So if a total ban on compensation is not adopted, those kinds of questions that you posed just then will still be hanging there as to the relationship of what caused the disease, when it was caused, what relationship did the tobacco smoking during the service relate to the onset of disease. Those are unanswered questions.

Mr. THOMPSON. Yes, sir. They are unanswered and some would say unanswerable. They are extremely difficult questions of fact for adjudication staff to sort out. I believe it takes considerably longer to develop the evidence and to adjudicate these claims than it does other more routine sorts of disability claims.

Senator HUTCHINSON. Thank you. Thank you, Mr. Chairman.

Senator JEFFORDS. Mr. Chairman, I would just like to briefly ask a question.

Chairman SPECTER. Go ahead, Senator Jeffords. We're glad to have you here and the floor is yours.

Senator JEFFORDS. My Committee of course spent a great deal of time looking at the tobacco issue. As we did that, I remembered my experiences in the military where you, at least this was back in ancient times, back in the 1950s, but at that time if you didn't start smoking in the military, it was sort of un-American. I think we bought cigarettes for \$1.00 a carton and you could have as many cartons as you wanted. Everybody smoked. So, just to combine that with my general philosophy which I expressed when we marked up

the bill, is that the money that comes from the settlement should be related to tobacco related diseases.

Just my own experience is that those who spent a long time in the military were, whether willingly or unwillingly, exposed to a great deal of smoking whether they smoked themselves or whether they breathed the air around them. So I am certainly bent towards the notion that if there is a settlement of large sums of money, certainly the veterans ought to participate. I just wanted to add that little bit for whatever it's use.

Chairman SPECTER. Thank you very much, Senator Jeffords.

Thank you very much Ms. Keener, Mr. Thompson, Judge Endicott, and Dr. Garthwaite. What the matter boils down to is that we have an opinion of counsel under the applicable law that nicotine addiction is a disease and that having nicotine in the service, if that's the causal factor for smoking later, that that is the responsibility for the disease having been incurred while in the military, and it depends upon an individual examination and adjudication as to the specific facts of the person who comes forward. There is a concern that there will be a burden to the Veterans Administration if these claims are recognized. So far, there has not been. But as I hear the contention being made here today from Dr. Garthwaite, when it is understood what the potential is, there may be more who will come forward. On this date of the law, the veteran has rights which have been articulated by the General Counsel interpreting the law. Dr. Garthwaite nods in the affirmative. And it's a little inconvenient because there may be a lot of claims made.

And then, we have this substantial sum of money, \$17 billion, or \$10.5 billion taking CBO's figures, which can very nicely handle some other problems in the budget. So the "Administration," nebulous Administration, the President, OMB, would liked to have had legislation last fall to change the opinion of General Counsel. They came to me and they came to Senator Rockefeller and wanted to put through the legislation. We declined to do so, because it was a hurry-up piece of legislation without any basis for being enacted except for the convenience of eliminating this claim, which is justified in the law.

I must say, as a matter of personal predilection based on my own experience, a story that I have told a lot of times and share with the four witnesses, my father was in World War I, and was wounded in action, he carried shrapnel in his legs until the day he died, and the veterans of that war were promised a bonus. They didn't get the bonus because the Government found it inconvenient, somewhat similar to what's going on today, so the veterans staged a march on the Mall. I don't know how many marches there had been before

1932, they're very popular today, but I don't think they were too popular then and the army was called out. The President called out the army and the army fired on the veterans. There hasn't been a blacker day in American history than occurred there. I recall it as a young child living in Wichita, Kansas, and how outraged my father was and how outraged I was and how outraged I still am.

It seems to me the Government calls young people, takes them far away from home, away from family and friends, subjects them to a lot of tension, and they smoke. The cigarettes are cheap or they're free, and they smoke and they develop these illnesses. The Government is the institution here and the individual needs to be protected. That's the story of America. That's the Bill of Rights.

Now we're going to call on Secretary West and the Under Secretary for Benefits, and see how the apology runs for the Administration. We thank you all very much. You're a bunch of good lawyers. Thank you. Three good lawyers and a good doctor.

The Honorable Togo D. West and the Honorable Joseph Thompson. The Secretary is not here, so we will go to the next panel.

Will Mr. Paul Wilkerson, Mr. David Gorman, Mr. Gordon Mansfield, Mr. Kenneth Steadman, and Mr. William Russo come forward please. Let us call first on Mr. Wilkerson, if we may.

Mr. Wilkerson is the distinguished Deputy Director for Operations of the American Legion. Mr. Wilkerson, we're on a tight time line, so we're going to put the clock on. Would four minutes do it?

Mr. WILKERSON. Yes, sir.

Chairman SPECTER. Would you settle for three? [Laughter.]

Mr. WILKERSON. Can do.

Chairman SPECTER. We'll go with four. Put the clock for four minutes.

### **STATEMENT OF PHIL WILKERSON, DEPUTY DIRECTOR FOR OPERATIONS, THE AMERICAN LEGION**

Mr. WILKERSON. Mr. Chairman, I wish to thank you very much for this opportunity for the American Legion to appear before this distinguished Committee this morning. We wish to commend you in particular for holding this timely hearing on a subject which is very important not only to the American Legion, but to this Nation's veterans.

It comes at a time when there are efforts by the Administration and some in Congress to forfeit historic rights and benefits of veterans who may become disabled or die as a result of tobacco related diseases which can be traced back to their period of military service. The American Legion is adamantly opposed to those efforts.

This is more than just an annual battle over budget dollars for VA programs. It involves a clear cut fundamental question of equity for this Nation's veterans. It is a matter of legal, moral, and ethical principles and congressional responsibility for the long-term consequences of the Federal Government's historic pro-tobacco policies and laws.

The President's fiscal year 1999 budget is understated. It is predicated upon the enactment of a change in the current law which provides entitlement to service connection for an injury or disease incurred in military service so as to bar the grant of service connection in any future tobacco related disease claims. Justification for this restriction is to reduce both future benefit costs and avoid increased workload and staffing requirements. In addition, it would reduce the potential future workload and costs of VA medical centers. We believe this rationale is an outrage.

Congress appears ready to repudiate its responsibility and abandon its historic commitment to veterans and their families in favor of special interests and popular projects. If such antiveteran legislation is enacted, it will establish a precedent allowing or any future Administration to sacrifice veterans' rights in the name of budgetary expedience. What group of service disabled veterans would be next singled out because their benefits are too expensive or there's too much work, such groups as Persian Gulf veterans, agent orange victims, radiation, prisoners of war, for that matter?

We hope this Committee will focus on the real issue in the tobacco claims. It is a deliberate effort to blame, we believe, the 1993 VA General Counsel for that opinion in creating this budgetary crisis. Whereas before judicial review in the Court of Veterans' Appeals, VA could ignore with impunity the provisions of Title 38 and arbitrarily deny service connection in tobacco claims, the VA General Counsel concluded that the law contemplates service-connecting diseases which can be related to tobacco use in service and that such use did not involve willful misconduct. It did not create any new benefit or entitlement. It just required VA to follow the law as enacted.

Clearly, there are those who do not believe the Federal Government has any responsibility to veterans who become ill or die from tobacco related illnesses. Congress, however, we believe should know better. Since the time of the Civil War, the Government has been in partnership with the tobacco companies and has promoted the use of tobacco. We believe the tobacco industry has now admitted it lied to the public, to Congress, and the courts in considering some form of liability settlement. We find it unconscionable that the needs and interests of veterans and VA programs would not be a priority in any such settlement.

Mr. Chairman, that concludes our remarks. I would be happy to respond to any questions.

[The prepared statement of Mr. Wilkerson appears on page 43.]

Chairman SPECTER. Thank you very much, Mr. Wilkerson. You said it very forcefully, legal, moral, and ethical principles. Pretty hard to go beyond that.

We turn now to Mr. David Gorman, Executive Director, Disabled American Veterans.

**STATEMENT OF DAVID GORMAN, EXECUTIVE DIRECTOR,  
DISABLED AMERICAN VETERANS**

Mr. GORMAN. Thank you very much, Mr. Chairman. Before I go into my testimony, I would just like to take this opportunity publicly to thank you, Mr. Chairman, and also Senator Rockefeller and your respective staffs very much for the cooperation and the help you've given to the DAV for a planned event we have up here on Capitol Hill on June 17, and that's the donation of 147 new vans to VA medical centers across the country. I just wanted to say that to you publicly. Thank you very much.

Chairman SPECTER. We're glad to do it.

Mr. GORMAN. I appear here today, Mr. Chairman, to tell you how strongly DAV objects to the President's proposal and the movement in Congress to take compensation away from veterans programs for what we consider to be pork barrel projects.

I framed the issue in that context, Mr. Chairman, because that is what the proposal to prohibit service connection for tobacco related illnesses is really all about. It is not about the merits of compensating tobacco related illnesses at all. If it were, there would not be such a rush to enact a proposal without any semblance of honest deliberation on its justification and the Senate Budget Committee would not have included this proposal in the Budget Resolution before we had the opportunity we have today to discuss its merits.

Although prohibiting compensation for tobacco related disabilities is a reasonable sounding proposal on its face, as I will now discuss, it is merely a pretext for making an unjustified and inequitable change in law. Under current law, veterans are entitled to compensation for the injuries and diseases they suffered during military service. The only exception to that general rule is that we don't compensate disabilities that result from willful misconduct.

Willful misconduct is a knowing and conscious prohibited action, such as the commission of a crime, or a reckless act, such as drunken or reckless driving. Lesser degrees of personal contributions to disabilities such as mere inadvertence leading to injury, or diet, or



lifestyles predisposing to disease do not lend themselves to serving as a basis to prohibit service connection.

The myriad nuances of such personal responsibility make it impractical, if not impossible, and certainly unfair to attempt to factor such matters into the decision on service connection. For example, as Monday morning quarterbacks, we don't second guess judgments made in combat to determine if wounds could have been avoided; we don't deny service connection for injuries sustained in the crash of military aircraft because of pilot error; and we don't investigate a servicemember's eating habits to see if they could have contributed to cardiovascular disease. Yet that is exactly, Mr. Chairman, what prohibiting service connection based on smoking would do.

It would inject lifestyle into the complex of variable elements of service connection because smoking is not misconduct within the meaning of the law. Indeed, smoking was not only authorized and condoned by the military, it was in many subtle if not overt ways encouraged by the military establishment in the military environment.

This proposal is not only unwarranted and unfair for that reason, it is unjustified and it is certainly inequitable because it subjects veterans to a dual standard. The Government now holds the tobacco companies responsible for the effects of smoking except when it comes to veterans. The Government has rejected the tobacco industry's excuse of smoker responsibility but the Government uses that very same excuse against veterans. The Government proposes no similar prohibition for other Federal beneficiaries. This is the exact reverse of our long tradition of affording veterans considerations we don't afford the publicly generally of giving veterans the benefit of the doubt that we don't give in other venues.

However, while today's veterans, like today's nonveteran smokers should be given the benefit of the doubt, we would not disagree if you determined the same does not necessarily apply to tomorrow's servicemembers. They can fairly be deemed to be fully on notice of the harmful and the addictive effects of smoking. A change in the law applicable to them would have a sound basis and an honest motive where the current proposal clearly does not.

Therefore, Mr. Chairman, I must conclude my testimony on this issue in very plain talk. The current proposal is not a good faith effort to make a sensible change in the compensation program. This initiative exploits today's antismoking fervor as a convenient excuse to rob monies from veterans programs and use it for other politically popular purposes. We believe it is shameful and we hope that the members of this Committee will not only decline to be a part of it, we hope to see you actively fight against it.

Mr. Chairman, that concludes my statement.

[The prepared statement of Mr. Gorman appears on page 52.]

Chairman SPECTER. Thank you very much, Mr. Gorman.

I would like to turn now to Mr. Gordon Mansfield, Executive Director of the Paralyzed Veterans of America. Mr. Mansfield, thank you for joining us. The floor is yours.

**STATEMENT OF GORDON H. MANSFIELD, EXECUTIVE DIRECTOR, PARALYZED VETERANS OF AMERICA**

Mr. MANSFIELD. Thank you, Mr. Chairman. I would like to submit my testimony for the record and summarize in a few minutes.

Chairman SPECTER. Your statement will be made a part of the record, as will all statements, and we thank you for the summary.

Mr. MANSFIELD. Thank you, Mr. Chairman, Mr. Rockefeller, and Mr. Jeffords, for your attention to this matter which we believe is very important.

Briefly, the history of this issue goes back to a short time ago when the leadership of the VA and following that the leadership of OMB came to the veterans service organizations and explained that they had a problem with this issue. The reason for their problem, as they explained it off the record and unofficially, was they didn't have the dollars available to pay for these claims and they didn't have the people available to process the claims if the claims came in.

Since then we've seen, one, it's not true because the number of cases allowed is minor. In a letter of March 23, 1998 to myself and other members of the Independent Budget Policy Committee, Under Secretary Thompson indicated, as I believe, Mr. Chairman, your statement did, that to date only 278 claims of 3,370 processed have been allowed. Currently, they show 7,419 claims in their system. This is not something that this agency can't handle. The other thing that wasn't true is that they didn't have the money. In a sense, when we say we don't have the money, I'm talking about the folks who put the Administration's budget together, because the truth is that the money is there. If you look at what has happened following the Balanced Budget agreement of last year, not only is this money there, there are many other funds available in the total budget.

We problem that we have in this is that you have a currently existing benefit for veterans. It is in the law. They've been processed. Veterans are getting these claims. It is not something to think about in the future. It exists now and has existed. Only the veterans are losing out in this issue. For example, we've pointed out that if somebody has a claim and goes to Social Security, as far as we know, Social Security is still processing these claims, never mind the numbers or the money.

The other problem, and one that perhaps is at the heart, is that over the course of the last number of years when this Government and this Congress has been struggling with deficit budgets, veterans have been asked consistently and continuously to provide monetary offsets to contribute to the well-being of the Government. An example is the most recent OBRA example where we gave up dollars and programs in the VA. I think the belief there was that veterans felt that we were once again assisting our Government in a time of need, perhaps in a different way than shouldering weapons and going off to war, but we were assisting our Government. I think the other thing, Mr. Chairman, is that the unspoken promise was made that things are tight now and you're asked to contribute, when things get better then the situation will change and when we get into situations where we need VA health care, VA benefits, then we'll be able to look at this situation in a different light.

I think the problem we have now is that we are into that situation. We've seen a budget proposed that proposes new dollars but doesn't propose any dollars for VA. We've seen a budget proposed that cuts VA health care where other new programs are being funded. I think we have to say that we categorically oppose this initiative. Thank you, Mr. Chairman.

[The prepared statement of Mr. Mansfield appears on page 62.]

Chairman SPECTER. Thank you very much, Mr. Mansfield.

We turn now to Mr. Kenneth Steadman, Executive Director of the Veterans of Foreign Wars. Thank you for joining us, Mr. Steadman, and the floor is yours.

### **STATEMENT OF KENNETH A. STEADMAN, EXECUTIVE DIRECTOR, VETERANS OF FOREIGN WARS**

Mr. STEADMAN. Mr. Chairman and members of the Committee, I represent the VFW, and I will be brief.

Let me say at the onset the VFW is opposed to the Administration's proposal to deny veterans compensation for sufferings from tobacco related disabilities. Our members have gone on record by resolution at our last National Convention opposing this proposal.

The VFW holds that smoking related claims should be adjudicated in accordance with the very same evidentiary standards that are applied to all other VA benefits claims. The Administration proposal would effectively treat smoking as a form of willful misconduct in order to deny compensation. I would ask this Committee, was General Eisenhower guilty of willful misconduct for chain smoking his way through World War II? Was General McArthur guilty of willful misconduct for smoking and displaying his pipe throughout the wars in the Pacific? And, of course, was General Creighton

Abrams guilty of willful misconduct for chomping on his cigar throughout the Vietnam War? We deem it intolerable to equate veterans use of tobacco with drug and alcohol abuse as is proposed.

Further, the Administration's assertion that some \$17 billion would be saved over five years, now estimated we understand at \$10.5 billion, by imposing such a ban is a callous and calculated exaggeration.

Another serious problem with this proposal is that it could result in a wrongful denial of compensation to veterans who have been smokers. For example, a Persian Gulf veteran who develops lung cancer due to toxic exposures incidental to Gulf service who also smokes could be denied warranted compensation under this proposal. This is because it provides that claims may be denied that are attributable in whole or part to the use of tobacco products by the veteran. The VFW deems this to be totally unacceptable.

One final point. If for some reason, despite our firm opposition, a ban on smoking related claims is enacted into law, the VFW would insist that any related savings be used to bolster VA and not pay for nonveteran related programs.

Last issue I briefly address here today relative to veterans and smoking pertains to the so-called "global tobacco settlement." There may be no doubt that smoking related disabilities have placed a tremendous strain on Veterans' Health Administration. This has undoubtedly contributed mightily to the system's current budgetary woes. We contend that the VA and veterans should be first at the table if any settlement emerges. Any such funds should be used to bolster VA medical systems, not take the place of appropriated dollars.

This concludes my statement, Mr. Chairman.

[The prepared statement of Mr. Steadman appears on page 65.]

Chairman SPECTER. Thank you very much, Mr. Steadman.

Our final witness on this panel is Mr. William Russo, Director of Veterans Benefits Program, Vietnam Veterans of America. Mr. Russo, thank you for joining us. We look forward to your testimony.

**STATEMENT OF WILLIAM F. RUSSO, DIRECTOR,  
VETERANS BENEFITS PROGRAM, VIETNAM VETERANS  
OF AMERICA**

Mr. RUSSO. Thank you, Senator. I would like to briefly follow up on an issue that was raised here earlier this morning, and that is the comparison of cigarettes to alcohol use. We don't think that is a valid comparison. It was made not only by Senator Craig, but by Secretary West in his written testimony. We feel that's an invalid comparison for at least two reasons. First, alcohol was not given away free with

every meal to the soldiers. Secondly, a time and a place were not set aside for people to drink alcohol while on duty.

The next point I want to follow up on is the holding of these claims in abeyance for four years. Our position is that does impose a hardship on thousands of claimants and that's really not necessary. No explanation has been offered here today for why these claims were held in abeyance for at least two years, a regulation was drafted but never published in the Federal Register and never made public, and then the claims were held in abeyance for another two years from 1995 to 1997 when these General Counsel opinions were released. So we haven't heard any explanation for that.

As a follow up, while it is true that these veterans whose claims are ultimately granted will be given retroactive compensation, those same veterans have had to wait for health care eligibility during those four years in which their claims were being held by the VA. So this has imposed a hardship on veterans and, frankly, we feel it is bad policy.

Taking away tobacco related compensation benefits because it is inconvenient for VA to process, because they are costly, or because it is politically incorrect or unpopular is a very dangerous precedent to set. What will be next—excluding benefits for disabilities based on a bad diet, or disabilities incurred in an unpopular police action or an unpopular war? We feel this is definitely a slippery slope. This is the first time in our knowledge that one class of VA claimants has been set aside and have their claims barred.

Secondly, an issue that has not been raised this morning is that the language in this legislation will not only bar the claims for cigarette ailments, but also other claims for cancer that may be the result of chemical exposure in service. The specific language in this bill says any claim that is in whole or in part based on cigarette use will be barred. Notwithstanding a letter that the Acting General Counsel, Mr. Coy, has provided, the language is clearly vague in this statute and we feel that it will be used to deny other kinds of service connection claims if there's any evidence that that disability might be partly related to cigarette smoking.

Another aspect of this is that not only will compensation be denied as a result of this bill, but, remember, you will be taking veterans out of a higher priority. The service-connected veteran will be in a lower priority for VA health care, so, in effect, this bill will deny VA health care benefits.

Finally, one thing that has not been stated here today is that this bill might violate the U.S. Constitution. Specifically, it might violate the equal protection clause which says that Federal beneficiaries have to be treated equally, and that in order to treat two groups differently you have to have a rational basis. What do we mean by that?

Specifically, veterans are being treated differently than Social Security recipients. Someone who has lung cancer and is totally disabled can receive social security benefits but a veteran under this legislation would be barred from receiving Federal benefits. In addition, you're treating one class of veterans, those seeking compensation for cigarette ailments, differently than all other veterans seeking service connection. So we feel this legislation, if it passes, may be challenged in Federal court and feel it will be overturned as unconstitutional. Thank you.

[The prepared statement of Mr. Russo appears on page 67.]

Chairman SPECTER. Thank you very much, Mr. Russo. I think the Committee has your point and it's a point that a number of us have made. But I think it is very important for your organizations to make the point again and to dispel any idea that it's a pro forma for perfunctory; that you really mean it and you're ready to fight over it.

We have a budget of \$1.7 trillion dollars. This large room is not big enough to accommodate the stuffing of \$10,000 bills into this room. It's a matter of priorities. If the budget stands, the availability of treatment is still present. And that's the next question for the Secretary is how they're going to handle it if this \$10.5 or \$17 billion goes somewhere else.

Senator Rockefeller?

Senator ROCKEFELLER. Mr. Chairman, I agree, of course, with what you say. I also want to thank the veterans service organization members for making their presentations, which we agree with.

I want to apologize to Secretary-designate West, I have to leave at 11:45, which means now. That could be interpreted as rudeness, but I think Secretary-designate West and I know each other well enough to know that it isn't. It is just that I have to go to a meeting and I apologize to him and to you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Rockefeller. Senator Jeffords?

Senator JEFFORDS. I have the same statement that Senator Rockefeller had. I have another meeting at this time so I won't be able to listen to the Secretary. I commend both of you for holding these hearings. I think it is critically important that we keep in mind these commitments, especially to veterans, and I assure you that I, as a veteran and as a member of the VFW, intend to do that. Thank you.

Chairman SPECTER. Thanks very much, Senator Jeffords.

Thank you very much gentlemen. We appreciate your being here and your point was well-made.

I would like now to call the Honorable Togo West and the Honorable Joseph Thompson.

Thank you very much for joining us, Mr. Secretary and Mr. Under Secretary. Your full statements will be made a part of the record. To the extent you can summarize, we would appreciate it. The floor is yours, Mr. Secretary.

**STATEMENT OF HON. TOGO D. WEST, JR., ACTING SECRETARY OF VETERANS AFFAIRS, ACCOMPANIED BY HON. JOSEPH THOMPSON, UNDER SECRETARY FOR BENEFITS, DEPARTMENT OF VETERANS AFFAIRS**

Secretary WEST. Thank you, Mr. Chairman. In turn, let me apologize to you and to Senators Rockefeller and Jeffords, I should have been in the room when you were ready to start. I was upstairs. But I am here. You have graciously accepted my statement for the record, so I will only make one opening point and then make myself available for your questions.

[The prepared statement of Acting Secretary West appears on page 37.]

As you know, Mr. Chairman, the veterans benefits statutes currently authorize payment of compensation to a veteran for service-connected disability and a surviving spouse, child, or dependent parent of a veteran for the service-connected death of the veteran. This legislation is about that definition.

As has been made clear earlier, as a result of two General Counsel opinions, we are currently faced with the prospect of paying compensation and providing health benefits for tobacco related illnesses on the assumption of a service connection. The legislation before you which we have advocated would change that. Our reasons for that proposal, Mr. Chairman, are three, and I will only mention that and then I will stop.

First of all, yes, it has been the position of the Department and of my predecessor that the decision to use tobacco by a servicemember is a personal decision. It is not a requirement of military service. And that, therefore, to compensate veterans for diseases whose sole connection to service is the veterans own tobacco use should not rest with the Government.

Mr. Chairman, the second reason that we have proposed is that we believe it exceeds the sense of American citizens and taxpayers of the Government's obligation. We're concerned that our responsibility at the Department of Veterans Affairs extends to assuring that we retain overall taxpayer and the American citizens' confidence in our basis for compensation. We fear that this would erode it. And, yes, although it is not by any stretch of the imagination—

Chairman SPECTER. Well, Mr. Secretary, why do you say that? What is there to suggest that the American taxpayers would be reluctant to see this recognition of veterans benefits?

Secretary WEST. Mr. Chairman, most veterans, like most Americans, do not use tobacco. The fact is that the perception we believe, and I come new to this issue, but we believe would be that we are compensating veterans for a disability that is not related to any requirement of their military service.

We believe that support of the American taxpayer and American citizens for our veterans is strong and support for compensation and benefits for them is strong and that it is based, in part, on two things: One, a sense of obligation to our veterans and servicemembers for the service they have rendered to this Nation; and secondly, a belief that the system of compensating them and/or providing them health benefits is one that is based on what they have endured in the line of duty as service to their country.

Chairman SPECTER. Mr. Secretary, I think it is certainly true that if there is a wound inflicted on the battlefield that that comes first. But you articulated in terms of "we believe." That's at least speculative on your part. Do you have any evidence of that? Have you had an avalanche of letters to the VA from citizens saying don't compensate the veterans for this? Have you conducted any polls on it, and I'm not a big believer in polls, but have you conducted any polls, have you seen any polls? What do you have beyond just the naked assertion that "we believe?"

Secretary WEST. We have conducted no surveys. I have no analysis of letters received on the issue, Senator. I would be happy to have the analysis conducted and provided. My statement of belief is simply a concern on our part that because the basis for benefits is so clearly explained and because the statutory basis is so clearly service connection, that if there is a perception that we are extending beyond that, then that will undermine the credibility of all of our programs of compensation.

Chairman SPECTER. But when you talk about service-connected, you have the testimony of the doctors and lawyers that it is service-connected.

Secretary WEST. No. What we have is their analysis and their opinions, two General Counsel opinions and an opinion by the Under Secretary for Health, that you can under existing precedence make out a case of a cause and effect, if you will, that would authorize the payment under these cases.

Chairman SPECTER. And a service connection.

Secretary WEST. Well, as I read the language, what it says is this. Addressing the statutory language of service connection, the actual



analysis goes like this, if the servicemember smoked, then you can essentially presume or you will examine the question of whether that smoking was the beginning of nicotine dependency. If you conclude that nicotine dependency did ensue continuing after service has been completed for a number of years and you produce a smoking related disability, then the causal connection there is sufficient to have established all the requirements, if an adjudicator concludes that, under the statutory language.

Chairman SPECTER. Including service connection.

Secretary WEST. Under the statutory language. But you have not heard me in my explanation point to you the service connection other than that the smoking occurred while on active duty. That would be the sole service connection.

Chairman SPECTER. Well, all right. It is the sole service connection but it is a service connection as the doctors and lawyers have analyzed it.

Secretary WEST. But your question to me is what's the basis for my concern that the American people might misunderstand that.

Chairman SPECTER. Well, there were two questions. I asked you that one, and then I moved to another question. Whether under existing law, it was not compensable in terms of the analysis of addiction, disease, and service-connected on those facts while in the military.

Secretary WEST. And the answer to all that, Mr. Chairman, is, yes.

Chairman SPECTER. Yes. Well, that's the issue. When young men and women are taken away from their homes, their families, their natural habitat, where they've been, and have been subjected to the rigors of basic training, the problems that have been heavily publicized lately about the issue of sexual harassment, whether there was or was not is not a matter for this hearing today, but lots of pressure on the young people, people under pressure do respond by lighting up a cigarette. That's a well-known fact just as a practical matter.

I'm very sensitive to the issue you have on how many people you can take care of and on the matter of priorities you have. If someone comes in and has a wound which happened during the Korean War or World War II or Vietnam or the Persian Gulf, sure, that comes first. But you do face, Mr. Secretary, a situation where the legal and medical analysis leaves the Veterans Administration obligated to compensate.

Now, you and I have some disagreement about whether the funds are present to handle it. I believe that when the \$17 billion—or analyzed by CBO as \$10.5 billion—has been moved away from the

Veterans Administration, your appropriation is going to suffer. You still, as Secretary of the Veterans Administration, will have the obligation to provide these medical services.

I understand that the Administration takes the position that those monies ought to be used elsewhere. And I understand you are subordinate to the President. I understand you have to go through the Office of Management and Budget. So if you were an elected official either from West Virginia or Pennsylvania, you might have a different attitude. I'm not asking you to comment on that. The elected officials have to make the judgments on that. But that's why we have elected officials and that's why we have separation of power. But I am very much concerned that if you don't have the money and these claims are made, as they have every right to be made, you're going to have a shortfall on your resources. Don't you worry a little about that?

Secretary WEST. I do, Senator. And you're right that we are obligated under current law to make the payments. That's why we're here, because we have proposed legislation that would relieve that obligation.

Secondly, I do agree with you that the cost considerations are significant. But they are by no means the overriding reason for our position. Our position, as much as you may agree or disagree, or as the folks who were just before, whose work on behalf of veterans, I personally have a great deal of respect for, agree or disagree, that was our basis, yes, the cost concerns are significant but that is only one of three base for our position here.

Chairman SPECTER. Well, I approach that issue with a little skepticism. And the reason I approach this with skepticism, although I've made the speech on a few occasions, you may not have heard it before and you may not have heard it today, because you came in late, is about the bonus promised for World War I veterans. That wasn't paid because it cost too much. And there are a lot of things the Federal Government doesn't pay because it costs too much. I just don't want this to be in that category.

Secretary WEST. I understand, sir. If I might, even though I've only been the Acting Secretary about 12 weeks, I would like to remind us all of a little history, and that is what came first here. And the thing that I remember is that my predecessor stood up and said it is not appropriate to make these payments, to have this compensation. Now, that came well before the concern about the savings. That has consistently been the position of this Department ever since he said that.

Chairman SPECTER. Well, the Secretary was just overriding the requirements of law when he said that.

Secretary WEST. Expressing his view.

Chairman SPECTER. Well, expressing his views, but he's not above the law. He cannot articulate a position which is not based on the legal requirements.

Secretary WEST. Exactly. He articulated a position which then evolved into the legislation that was presented here last year and that we present again this year. That's the basis of this.

Chairman SPECTER. All right. I'm interested in his views, but until the legislation is passed it is just one man's opinion.

Secretary WEST. Yes, sir, it is. And that of the Department and the Administration.

Chairman SPECTER. I don't know about that. But we don't have to debate that because if it's two men's opinions, or three men's opinions, or four men's opinions, or lots of men's and women's opinions, if it is not the law, we're going to enforce the law.

Mr. Thompson, you've been safe so far. Would you care to say anything?

Mr. THOMPSON. No, Senator. I would be glad to answer your questions, though. [Laughter.]

Chairman SPECTER. You just did. [Laughter.] Thank you all very much.

Secretary WEST. Thank you, Senator.

Chairman SPECTER. The hearing is adjourned.

[Whereupon, at 12:01 p.m., the Committee adjourned, to reconvene at the call of the Chair.]

## **APPENDIX**

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### **PREPARED STATEMENT OF CHAIRMAN ARLEN SPECTER**

The Committee on Veterans' Affairs will come to order. Today the Committee will consider the very important topic of tobacco and its relationship to the veterans' disability compensation system. I look forward to hearing from our witnesses and my colleagues.

It could be said that tobacco and military service go together like pancakes and syrup. America's armed forces have been best depicted by "Kilroy," or "G.I. Joe," often with a cigarette dangling from his lips. This image, of course, was aided and abetted by media coverage showing smoking cigarettes to be a glamorous, attractive and manly activity. Needless to say times have changed.

As an Air Force veteran with service during the Korean War period, I certainly remember the availability of cigarettes and other forms of tobacco, as I am sure all veterans present here today remember during their own periods of service. I understand that cigarettes were free for troops in the field, and even when they were sold, they were tax free.

Today we are here to consider a fundamental question: should the Committee support the Administration's proposed legislation to prohibit payment of compensation for disability or death due to tobacco use? Over the past five years, VA's General Counsels have provided legal opinions stating that current law requires such payments. Yet, then-Secretary Jesse Brown opposed these payments of such compensation for a number of reasons which we will review.

Also, the Administration has proposed that \$17 billion would be saved by not paying such compensation. The Congressional Budget Office estimates that \$10.5 billion would be saved. As you are aware, the Senate budget Committee has proposed using this so-called savings for non-veteran programs. I shall oppose this on the Senate floor, in debate on the budget resolution.

Our witnesses today will be arranged in three panels. Our first panel will be Ms. Mary Lou Keener, Judge James Endicott and Mr. John "Jack" Thompson, who will testify why they arrived at the legal opinions they offered concerning tobacco and disability. Dr. Thomas Garthwaite, the Deputy Under Secretary for Health, will join this panel to offer the Committee his views on the medical aspects of this policy. Judge Endicott was VA General Counsel during the Bush Administration; Ms. Keener was VA General Counsel in the current Administration from 1993 to 1997; Mr. Thompson is currently Acting

General Counsel and also is a career VA attorney who has participated in development of VA's tobacco policies since the beginning. We welcome these witnesses.

Our second panel today will present the current Administration's position on tobacco compensation. We will hear from the Acting Secretary of Veterans Affairs, the Honorable Togo G. West, Jr. Acting Secretary West will be accompanied by Mr. Joseph Thompson, VA's Under Secretary for Benefits; and Thomas Garthwaite, M.D., VA's Deputy Under Secretary for Health.

We will receive testimony from Secretary West on VA's current policy with respect to tobacco compensation; how VA deals with tobacco related diseases in the VA health care system; and VA's role—if any—in the Administration's internal discussions on the so called "global settlement" of the tobacco lawsuit.

Also, we need to know from these witnesses how much funding the Veterans Health Administration is expending in the care of veterans who suffer from tobacco-related illnesses, and what role VA is playing in determining the Administration's policy with respect to the seeking of relief from the tobacco industry for higher health care costs from tobacco.

Our third panel today will represent veterans. We will hear testimony from the leadership of the American Legion, Veterans of Foreign Wars (VFW); Disabled American Veterans (DAV); and Paralyzed Veterans of America (PVA). One group, American Veterans of World War II, Korea and Viet Nam—AMVETS—was unable to attend and asked that its written statement be included in the record of today's hearing, which we will do without objection. The veterans offer important testimony. If there are to be any savings from the results of the Committee's action on this matter, they should be used for veterans' programs—especially health care—which, in my view, is under-funded. But we must first make a determination on the underlying issue of whether or not to prohibit payment of compensation for disability or death due to tobacco use.

This is the essence of our inquiry today, and my hope as Chairman is that we make some progress so that we can see these issues as clearly as possible and can make the right decision for the country and for our veterans who served. I look forward to hearing testimony from our witnesses as well as commentary from all my colleagues and the Committee's Ranking Member, Senator Rockefeller.

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## **PREPARED STATEMENT OF SENATOR STROM THURMOND**

Mr. Chairman:

It is a pleasure to be here today to consider the question of compensation for tobacco-related disabilities and related issues. This is a matter of great concern to me, and I know to you as well. I join you in welcoming our distinguished witnesses, Acting Secretary of Veterans Affairs Togo West, other current and former officials of the Department of Veterans Affairs, and representatives of the Veterans Service Organizations.

Like other elements of the tobacco debate, Mr. Chairman, this issue is complex. The Memoranda of the Department of Veterans Affairs over the past few years illustrates that complexity. The original opinion of the General Counsel, issued January 1993, held that the determination of whether nicotine dependence may be considered a disease is an adjudicative matter to be resolved based on accepted medical principles. Yet, as recent as last May, the Under Secretary of Health stated his supposition that nicotine dependence "may be considered a disease" but raised many questions as to when a person becomes dependent. In June 1997 the Director of the Compensation and Pension Service expressed concerns about the lack of clear policy guidelines regarding nicotine dependence.

Other issues regarding compensation raise similar questions. Ambiguity exists on the question of determining service connection. Questions remain within the VA on how to determine whether nicotine dependence arising during service may be considered the proximate cause of disability occurring after service.

The point is, Mr. Chairman, that even after five years of discussion within the Department of Veterans Affairs, there appears to be uncertainty on how adjudication personnel are to proceed. I hope the witnesses will clarify these medical and legal principles.

Beyond the issue of compensation, Mr. Chairman, are questions and concerns regarding the budgetary impacts of the President's Budget request. I am concerned that the President proposed legislation denying compensation to veterans, without first resolving, within his own administration, the issues I previously outlined. Nevertheless, the administration did forward a proposal to deny compensation and use those savings for non-veteran purposes. A second level of concern is the use of savings in the mandatory accounts to offset increases in discretionary spending. This appears to be a backdoor method to avoid the spending caps negotiated in last years Balanced Budget Agreement.

In conclusion Mr. Chairman, I again thank you for holding this hearing to shed light on some of these concerns. We must act with care and deliberation as we consider the medical evidence, legal issues, policy concerns, and budgetary impacts of this matter.

Furthermore, I believe we must examine this issue in the context of the broader issues raised by proposed tobacco settlement legislation.

I thank Acting Secretary West and the other witnesses for their testimony today. I look forward to reviewing the record and working with you to make sure our veterans are treated fairly and honorably.

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### **PREPARED STATEMENT OF SENATOR DANIEL K. AKAKA**

Mr. Chairman, I am pleased that the Committee is holding this hearing on veterans compensation for tobacco-related illnesses. As you are well aware, the Senate Budget resolution proposes veterans be denied compensation for tobacco-related illnesses and the savings be shifted to additional transportation projects.

This hearing will help us determine whether we continue compensating veterans for tobacco-related illnesses. Under current statutes, VA's General Counsel has determined that VA is authorized to pay disability compensation to veterans who prove that they became addicted to tobacco while in military service, and if the continued addiction resulted in disability. Over the past several years, nearly 7,000 veterans have filed tobacco-related disability claims. However, only 278 veterans, or less than 4 percent of those who filed, have received compensation.

The question before this Committee is whether the Federal government will continue to be responsible for compensating veterans for tobacco-related illnesses that may have occurred as a result of smoking while on active-duty. Mr. Chairman, I am not fully convinced that the Department of Veterans Affairs should be paying compensation for tobacco-related illnesses for veterans. I do believe, however, that veterans should be afforded the same benefits and services that may be provided to non-veterans under the proposed tobacco settlement.

The more immediate question that this Committee will have to confront is the provision included in the proposed FY99 budget by the Senate Budget Committee. The Budget Committee bars disability compensation for tobacco-related illnesses. The Committee made this decision without the benefit of any hearings on this issue, and without the counsel and support of this authorizing Committee. This is travesty and affront to Members of this Committee and to our nation's veterans. Without a doubt, I strongly disagree with the Budget Committee's decision to transfer supposed savings from the veterans account to the general function account to fund additional transportation projects.

Mr. Chairman, it is unfortunate that our nation's veterans are sacrificed, once again, not for a noble cause like freedom and democracy, but for a road, tunnels, and bridges--and jobs.

If there are truly savings from denying veterans disability compensation for tobacco related illnesses, these savings should go toward ensuring quality health care and benefits for veterans before we seek other worthy causes.

Mr. Chairman, I want to thank you for holding today's hearing and for raising the attention of the plight of our nation's veterans. I look forward to working with you, Senator Rockefeller, and other members of this Committee to resolve these issues.

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**PREPARED STATEMENT OF HON. TOGO D. WEST, JR.,  
ACTING SECRETARY, U.S. DEPARTMENT OF VETERANS  
AFFAIRS**

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the Department of Veterans Affairs (VA) on legislation the Department has proposed to limit the provision of veterans' benefits for tobacco-related disability and death.

Mr. Chairman, as you know, the veterans' benefit statutes currently authorize payment of compensation to a veteran for a service-connected disability and to a surviving spouse, child, or dependent parent of a veteran for the service-connected death of the veteran. A disability is considered to be service connected if it results from injury or disease incurred or aggravated in line of duty in active service. Under VA regulations, direct service connection may be established for disability from a disease first manifesting itself after service discharge when all the evidence establishes that the disease was incurred in service.

On January 13, 1993, in response to an opinion request from the Board of Veterans' Appeals, the VA General Counsel issued a precedent opinion which held that direct service connection of a disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in active service. The opinion indicated that, in order to determine whether service connection may be established for disability resulting from injury or disease due to tobacco use, a VA adjudicator must determine, based upon the evidence of record, whether a particular veteran's smoking while in service resulted in the injury or disease and must take into consideration the possible effect of smoking before or after service. In a subsequent precedent opinion issued on May 13,



1997, the VA General Counsel indicated that, assuming nicotine dependence may be considered a disease for compensation purposes, service connection may be established on a secondary basis under 33 C.F.R. § 3.310(a) if a veteran acquires a dependence on nicotine in service and that dependence, and resulting tobacco use, may be considered the proximate cause of disability or death.

Our legislation would have the effect of prohibiting service connection of a disability or death due to a disease arising postservice if the only connection between the disease and military service is the veteran's own use of tobacco products then. This legislation would apply only to claims filed after the date of its enactment.

Our proposal is based upon three considerations. First, the responsibility to compensate veterans for diseases whose sole connection to service is the veteran's own tobacco use - in some cases only briefly - while in service should not rest with the Government. Congress has recognized the appropriateness of boundaries to the compensation program by prohibiting payment of disability benefits for illnesses based solely on the use of alcohol and drugs during military service. Like the consumption of alcohol, the use of tobacco products is not a requirement of military service.

Second, we believe that providing benefits in cases addressed by our legislation exceeds Americans' sense of the Government's obligations to veterans and, as a result, threatens to undermine public support for VA programs. Clearly, our Nation has an enduring obligation to those veterans who become sick or injured while defending our freedoms. That is why our compensation programs deservedly enjoy such broad-based public support. Most veterans, like most Americans, do not use tobacco products. It is inappropriate to compensate those veterans who do use tobacco, and their survivors, under a program developed for veterans who became disabled in service to our nation. As stewards of these programs, VA has an obligation not only to administer them faithfully, but also to recommend appropriate changes when we sense they may be imperiled by a potential threat to their public support. Americans do not, in our opinion, hold the Government responsible for veterans' smoking, and we would not want our payment of compensation for tobacco-related disability or death occurring after service to diminish the high regard in which veterans' programs are held.

Third, the current requirement that VA consider disability or death attributable to in-service tobacco use to be service connected could have enormous negative implications in terms of both cost and impact on VA claims processing. If projections regarding the number of future tobacco-related claims - more than 500,000 - prove anywhere

near correct, VA's claims system could be so overwhelmed as to result in unconscionable claims processing delays for all VA claimants.

As reflected in the Administration's fiscal year (FY) '99 budget submission, enactment of this proposal would result in FY'99 savings of \$741 million and five-year savings of approximately \$17 billion. This estimate reflects processing of 357,000 claims over five years or an average of 71 1000 claims per year. The estimated cost of compensating veterans was established after months of combined efforts of experts in VA and OMB and Jeffrey E. Harris, M.D., Ph.D., a practicing physician and a professor of economics at Massachusetts Institute of Technology. Dr. Harris is a nationally recognized expert in the economics of tobacco use, especially health-related costs. Dr. Harris suggested that VA address, in our compensation estimate, 12 disease categories known to have a significant causal relationship to smoking. This list of diseases captures the greatest number of tobacco-related illnesses, but it is not all inclusive. After applying nationally accepted prevalence rates of relevant populations to the veteran population to estimate the number of veterans with one of the identified diseases, veteran-specific smoking-attributable factors for each disease were calculated. A national medical survey was used to calculate a factor which could estimate how many of those veterans with a smoking attributable disease began smoking during military service. The application of these factors served to reduce the number of potential claimants in our estimate by eliminating any cases that did not meet all requirements for service-connected compensation.

An average cost was applied to the estimated claims in each of the disease categories. To create the potential cost associated with the disease categories, Dr. Harris consulted with VA and reviewed the actual rates at which compensation is currently paid for these diseases. VA and Dr. Harris combined significant and current scientific and economic knowledge of tobacco-related morbidity with expert knowledge of the veteran population and compensation system to create a cost estimate of greatly enhanced validity.

You specifically requested VA's position on participation in the "global tobacco settlements." VA has not been an active participant in the settlement negotiations because our programs were not at issue in the litigation in question. VA, however, has gone on record within the Administration as requesting that, if reimbursement of Federal health care costs is to be an element of the final agreement, VA should share in that recovery. We have developed no contingency plan involving reimbursement of compensation costs from third parties if our proposal is not adopted. We believe our legislative proposal should be enacted on its merits. It is the best course of

action to ensure the continuing integrity of veterans benefit programs.

This concludes my statement, Mr. Chairman. I would be pleased to answer any questions that you or other members of the Committee may have.

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**PREPARED STATEMENT OF HON JAMES ENDICOTT,  
FORMER GENERAL COUNSEL, U.S. DEPARTMENT OF  
VETERANS AFFAIRS**

Mr. Chairman and members of the Committee. Thank you for calling this important hearing and for allowing me an opportunity to testify concerning VA Office of General Counsel Precedent Opinion 2-93 which I approved and signed on January 13, 1993 while serving as General Counsel of the Department of Veterans Affairs.

To my knowledge, the legal basis for the opinion has been much debated but never found to be defective or legally unsound. It does fairly recite what the law was in 1993 - and is today in my opinion.

The 1997 opinion of the Under Secretary for Health presented the same medical knowledge that was included in the 1993 opinion. This opinion did not create a new disability or disease but reflected what existed in law at that time - in 1993.

The opinion was designed to be a roadmap for the Under Secretary for Benefits and the Veterans Benefits Administration to guide their adjudication officers in evaluating smoking claims. The opinion provided broad latitude to consider a lifetime of smoking after service and smoking prior to entry into service.

If you would have told me in 1993 - that I would be back in Washington today - to talk about this opinion - I would have been very surprised.

At the time - I saw this as a fairly straight forward opinion that primarily addressed the question of whether the act of smoking was or was not misconduct. It clearly was not and is not.

I was concerned however that this opinion might be viewed and construed as a retrenchment from the Department's aggressive anti-smoking initiatives that began in 1989 under the tenure of Secretary of Veterans Affairs Derwinski.

A Veteran had tragically died from a fire and injuries related to this Veteran smoking in his VA hospital bed.

Thereafter the Secretary moved to prohibit smoking in all VA facilities - both the traditional workplace and in the hospitals and other medical facilities.

The Secretary later reluctantly relented - to permit some hospitalized Veterans to continue to smoke and to provide smoking shelters or facilities for these hospitalized and smoking Veterans.

Sales of cigarettes was deeply curtailed in VA Canteens and no displays of cigarettes were allowed.

I am a non-smoker and would personally hope that no current or future Veteran would smoke. I am convinced that if every Veteran who smokes - would stop today - that they would live longer to enjoy the life and freedoms - that they put their life on the line - to protect.

I am amazed that some appear to be assuming that America's Veterans were not subject to the same misleading information provided to other Americans - with that withheld information being the basis for the various smoking related lawsuits.

And our Veterans were in many cases provided that first cigarette by our Government as part of their daily food ration or as part of a comfort pack.

I have always wondered but do not know the answer. How did those cigarettes get there? Did the Government buy them or were they donated by the manufacturers? I would imagine the answer is both. But clearly, the Government was the agent that ultimately gave these cigarettes to our Veterans.

A concept of service connection twenty four hours a day, seven days of week in peace and war for legal activities - is our system. How then can smoking be carved out as an exception? Smoking is legal even though it may be dangerous.

The current Government approach generally to smoking seems to be prevention and reimbursement to health care systems to pay for past smoking related medical care.

Should America's Veterans receive any less than that?

If there is to be a good result from my much discussed opinion - I would hope it would be that the VA would aggressively seek to encourage all smoking Veterans - to stop now!

I would rather see and be with healthy fellow Veterans rather than sick Veterans receiving disability payments.

I would urge that the Committee support legislation that would do five things:

1. Fund and require the VA to offer smoking cessation counseling, and treatment and medications to every smoking Veteran.
2. Except for certain Veterans whose mental or medical condition is so far advanced that they cannot stop smoking provide that after a date certain in the future - no Veteran can be

compensated for service connected smoking disabilities - **UNLESS** the Veteran has first stopped smoking.

3. Document a history of pre-service smoking for each new servicemember and provide that such servicemembers will not receive disability ratings for smoking related disabilities **UNLESS** they stop smoking while in service and do not resume smoking after service.
4. Insure that America's Veterans are not cut out of the smoking litigation settlement by funding such new VA smoking cessation programs and disability payments from such settlement funds.
5. Fund and require the Secretary to promulgate regulations for smoking Veterans such as those currently in effect for Veterans exposed to radiation that should and could provide a provision for supervening non-service connected determinations when appropriate (38 CFR §3.311).

When I appeared before the Committee for confirmation, I was specifically asked how I would resolve doubt when it dealt with a Veteran. I told this Committee - that if I erred - it would be in favor of a Veteran and not against a Veteran.

This was an attitude that I reinforced within the Office of General Counsel - and particularly within the Staff Group VII that represents the Secretary before the U. S. Court of Veterans Appeals.

Without any specific legislative authority, I did institute the concept of settlement of cases before the Court of Veterans Appeals - a practice that is fair to Veterans - and a practice that continues today.

It is my opinion that each cigarette smoking disability claim is unique and involves very individual circumstances. The Veteran of three wars who was repeatedly placed in Harm's Way in combat or other isolated and stressful circumstances - may be totally different than the Veteran who served solely in peacetime in the United States.

I would hope that we can let the current adjudication system sort out these individual claims - to include an appeal to the U. S. Court of Veterans Appeals, if necessary. Such appeals are user friendly and the Court was created to give Veterans a court with expertise to resolve their concerns about fair adjudication of their claims within the law.

The Court of Veterans Appeals has been a great success story for America's Veterans and the Court had even foreseen this smoking

issue as outlined in a concurring opinion in *Sawyer v. Derwinski*, 1 Vet App 130, 138 (1991).

If I erred in OGC Precedent Opinion 2-93, it was for the benefit of America's Veterans. That is what I told you I would do. But I do not believe that the opinion is in error. It simply recited the law as it was in 1993 and as it is today.

Thank you for inviting me to be with you today.

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**PREPARED STATEMENT OF PHILIP R. WILKERSON,  
DEPUTY DIRECTOR NATIONAL VETERANS AFFAIRS  
AND REHABILITATION COMMISSION, THE AMERICAN  
LEGION**

Mr. Chairman and Members of the Committee:

The American Legion appreciates the opportunity to comment on the administration's and Congress' proposal in the FY 1999 budget to prohibit future veterans' claims for compensation benefits and medical care for tobacco-related claims. As requested, we will also discuss our views on the so-called "savings" associated with the elimination of tobacco-related claims as well as veterans' issues in a "global tobacco settlement."

The American Legion is not only disturbed about this proposal, but is also very disturbed and displeased with VA and the administration. When today's hearing was announced, The American Legion contacted the Veterans Benefits Administration to obtain the necessary information regarding the cost of annual benefits paid to veterans receiving compensation for tobacco-related illnesses. Because The American Legion did not receive the requested information, the office of the Director for the Veterans Benefits Administration was also directly contacted. The American Legion is still waiting for this information from VA through official channels, although we did actually obtain the necessary information from an outside source. The administration's failure to respond to important and necessary information requests is preventing an open, honest and complete dialogue regarding this historic and negative proposal.

The American Legion is adamantly opposed to efforts by the administration and Congress to take away rights and benefits from veterans who become disabled as a result of their military service to this nation. This is more than just an annual battle over budget dollars, this is a matter of legal, moral, and ethical principles and congressional responsibility.

Each year, Congress is required by law to appropriate enough money to pay for all mandatory veterans' benefits. In FY 1999, this

will amount to approximately \$23.5 billion. Of that amount, about \$21.8 billion is required to fund compensation benefits for service-connected disabled veterans and Dependency and Indemnity Compensation (DIC) to the survivors of veterans who died as a result of a service-connected cause. Also included in the mandatory funding category are the programs of disability and death pension, education assistance, and vocational rehabilitation for disabled veterans. The remainder of VA's appropriation (\$18 billion) is for discretionary spending on staffing in the regional offices and medical centers, VA medical care and other important programs.

The American Legion is deeply concerned that the President's FY 1999 budget request for VA entitlement programs is seriously deficient in a number of areas. A substantial increase in Montgomery GI Bill benefits is long overdue. The American Legion has for years advocated the need to increase these education assistance benefits to keep pace with the escalating costs of higher education. In addition, VA should provide additional support to the veterans' employment programs in the Department of Labor, particularly those to assist Vietnam Era veterans. Increased funding is also desperately needed in the Veterans Health Administration because of chronic under funding. The American Legion continues to believe Congress should consider reinstating the entitlement to VA Vocational Rehabilitation and Training which was previously authorized as a result of the U.S. Court of Veterans Appeals decision in Davenport v. Brown.

Requested funding levels for FY 1999 and the outyears are predicated upon the enactment of legislation barring the payment of future claims for service connection for any disability or death due to tobacco-related illness. According to the budget justification, the purpose of this controversial legislation is to not only to reduce future budget outlays for veterans' disability compensation and DIC, but also to avoid increased workload and staffing requirements. In addition, it would eliminate entitlement of VA medical care for thousands of veterans, thereby reducing potential future workload and costs for VA medical centers. The American Legion believes this is an outrage.

Mr. Chairman, veterans suffering from the long-term health consequences of pro-tobacco legislation and government policy over the last 100 years are in danger of losing their right to compensation and medical care benefits, if the budget is enacted as proposed. Of equal concern, this legislation will fundamentally alter the historic legal concept of service connection. It will establish a precedent which will enable this or any other administration to sacrifice the rights and benefits of any group of service-connected disabled veterans and their survivors on the altar of budgetary expediency.

Congress appears poised to abandon its historic and long-standing statutory commitment to those veterans who become ill or die from a disease related to their period of service in the Armed Forces. This process is already underway with the Senate Budget Resolution approved by the Senate Budget Committee two weeks ago. That proposal would provide a \$10.5 billion offset to the VA budget to fund increased spending for future highway and mass transit programs. Current budget policy is clearly antiveteran. Veterans who earned the right to compensation benefits by virtue of their military service to this nation are now being singled out as a major source of funds for highway improvements. No other group of citizens who are ill from tobacco-related illness is being arbitrarily stripped of their eligibility for federal benefits and medical care.

Prior to the establishment of the U.S. Court of Veterans Appeals and judicial review in 1988, claims for veterans' benefits based on a tobacco-related illness were not an issue for VA. Any such claims were rare. Few, if any, were decided favorably due to the veteran's inability to prove to VA's satisfaction that a cancer or other disease was directly related to their period of military service. Even with adequate evidence of tobacco use in service and a statement from the veteran's physician that this was directly related to the currently diagnosed disability, VA would routinely deny these claims by determining the medical opinion to be speculative. Veterans had no further appellate recourse or means of compelling VA to make a fair and proper decision on the merits of their claim. Potentially eligible veterans were arbitrarily denied due process and benefits.

Ten years ago, this committee was instrumental in the development and passage of the "Veterans Judicial Review Act" which required VA to follow the law as enacted by Congress, as well as follow VA regulations. The American Legion supported this legislation. In 1991 and 1992, the Court of Veterans Appeals rendered decisions in Sawyer v. Derwinski, 1 Vet.App.130, 138 (1991) and in Douglas v. Derwinski, 2 Vet.App. 103 (1992) respectively. These decisions legally required VA to consider the medical/legal issues of linkage in adjudicating claims for service connection where the disability in question arose years after service.

In 1993, the Board of Veterans Appeals requested a formal opinion from the VA General Counsel on whether VA compensation was payable for disability related to a veteran's tobacco use while in service. In OGC Precedent Opinion 2-93, the VA General Counsel discussed the relevant decisions of the Court of Veterans Appeals and the Supreme Court as well as recent medical studies in concluding that a claim for service connection for a tobacco-related disease which developed years after service discharge was, in fact, legally possible.



Furthermore, the General Counsel's opinion also determined that, under the various applicable laws, tobacco use in service neither constituted willful misconduct nor drug abuse.

There appears a deliberate effort by the administration and some members of Congress to characterize the VA General Counsel's opinion as "giving away the store." What the General Counsel did in this opinion was to follow the legal precedents established by the Court of Veterans Appeals and the Supreme Court. This opinion clarified, but did not expand or alter, the definition of a service-connected disability in reaching the conclusion that VA compensation benefits could be payable for a tobacco-related disability. It essentially outlined the parameters of the law and regulations under which tobacco-related claims were to be adjudicated. The American Legion believes that even without the General Counsel's opinion the law clearly requires VA to pay compensation for all service-connected disabilities, including tobacco-related diseases.

Following the opinion's release, VA announced that more specific guidance to the field stations was needed to properly adjudicate this type of claim. A moratorium was placed on the processing of tobacco-related claims, pending the promulgation of the necessary guidelines. This moratorium remained in effect from 1993 until May 1997, when the VA General Counsel issued a second opinion, VAOGCPREC 19-97, specifically addressing the issue of the relationship of nicotine dependence to a veteran's use of tobacco in service and the subsequent development of a recognized tobacco-related disease. Shortly thereafter, instructions were issued to the VA regional offices outlining the criteria under which tobacco-related claims were to be adjudicated and the VA regional offices began processing the 4,000 claims which had been received since 1993.

To date, a total of 7,400 claims have now been filed. VA has adjudicated less than half of these claims and approved benefits in 278 or nine percent of the cases. If the current approval trend continues, there will be a total of 666 approvals. VA has indicated that on average, \$8,850 will be paid annually in each claim approved over the next five years or a total of about \$28 million. Assuming the bar to tobacco-related claims is defeated, The American Legion would expect that, if an additional 7,400 claims were received and adjudicated over the next four years with the current grant rate of nine percent, 666 cases would be approved and \$28 million in compensation and DIC benefits paid.

Mr. Chairman, assuming the prohibition of future tobacco-related claims is enacted and using VA's numbers, the federal government will only save about \$28 million over the next five years, compared to the approximate \$17 billion and \$10 billion projected by the Office of

Management and Budget (OMB) and the Congressional Budget Office (CBO) respectively. The American Legion believes VA's caseload and benefit cost projections to be vastly overstated and the billions in so-called "savings" to be fictitious. In order to cover these savings shortfalls, will Congress come back and once again raid the veterans' Compensation and Pension account?

During the period from 1993 to 1997, there were discussions at the highest levels within VA about the legal and practical implications of the General Counsel's opinions. In early 1997, VA commissioned a study by Dr. Jeffery Harris which projected a potential caseload ranging from 200,000 to 1.1 million new tobacco-related claims and benefit costs of \$1.6 to \$17 billion over the next 5 years. VA's immediate reaction was that disaster was imminent - "the sky is falling - there will now be an avalanche of new claims - the long-term cost for benefits and veterans medical care threaten the integrity of the VA system." VA then argued that tobacco-related claims were a threat to the fiscal integrity of the VA compensation program.

Within less than eight weeks of the May 1997 VA General Council's opinion, Senator Specter, upon request, introduced S. 987, legislation to bar future claims for service-connected disability or death due in whole or in part to tobacco use during military service. The President's FY 1999 budget request for veterans' disability and death compensation and regional office staffing is predicated upon the assumption that, beginning in FY 1999, VA will not have to process or pay claims involving tobacco-related illnesses.

According to OMB estimates, this will result in so-called budget "savings" over a five year period of some \$17 billion. The CBO estimates the "savings" to be only about \$10.5 billion. It should be clear there are very little budget "savings" involved. The administration is attempting to justify this fundamental breach of faith with service disabled veterans by proposing that a portion of the \$17 billion which Congress was otherwise obligated to appropriate would be used for some improvements in other veterans' programs.

The American Legion is extremely concerned and disappointed by Acting Secretary Togo West's written response to a question from his March, 1998, confirmation hearing - "Please explain in detail your understanding of the basis for VA's proposal that Congress bar compensation for smoking-related diseases." Secretary West stated, "The proposal is premised on the belief that to provide benefits on a service-connected basis for these individuals exceed the Government's responsibility to them. Moreover, to the extent that providing benefits in these cases also exceeds the American peoples' sense of the Government's obligations to veterans, it could seriously undermine support for our programs."

The American Legion believes these statements reflect the “belief” of the administration, not the American people. By pursuing this legislative solution at the obvious urging of the administration, VA is abdicating its traditional role as the guarantor of veterans’ rights and benefits to become “the guardian of the public purse” and the arbiter of national health policy. This policy is contradictory and inconsistent with VA’s statutory obligation and Acting Secretary West appears willing to give lip service to veterans than act as a true veterans’ advocate. Simply put, the proposal to prohibit claims for tobacco-related illness seriously undermines the support for veterans’ programs and sets a dangerous precedence.

The current principle of a service related disability or death, as set forth in title 38, United States Code, Section 1110, has been a cornerstone of veterans’ law since 1917. The Court of Veterans Appeals has made it clear in precedent decisions that this concept contemplates not only those disabilities incurred while on active duty, but also those which may develop years later and which relate back to the period of active service. The 1993 and 1997 VA General Counsel opinions are consistent with the legal principles set forth by the Court of Veterans Appeals. These opinions are binding on the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the Board of Veterans Appeals (BVA).

As discussed earlier, there are stringent legal standards which must be met in a claim for a tobacco-related disability. Just because you smoked in service does not mean you are now automatically eligible for benefits. There are now a number of VA recognized tobacco-related diseases: cancers of the lip, mouth, pharynx, esophagus, larynx, pancreas, lung, kidney, bladder, and other urinary tract cancers; coronary heart disease, stroke, other circulatory diseases, and chronic bronchitis. In order for VA to pay benefits, the veteran must provide evidence of the following:

- he or she started smoking while in service, based on a sworn statement or other evidence; and
- there is a currently diagnosed tobacco-related illness; and
- a medical opinion states the veteran was addicted to tobacco in service and the current illness is directly linked to the use of tobacco in service.

Mr. Chairman, the administration and Congress are clearly seeking to ignore the federal government's culpability and liability with regard to smoking and are attempting to shift the blame for this

budgetary crisis to the “victim,” i.e. veterans and their survivors. The administration’s and Congress’ approach to this problem keeps ignoring the real culprits which are the tobacco industry and the policies of the Department of Defense and VA. Since the Civil War, the federal government promoted, condoned, fostered, and encouraged the use of tobacco products by members of the Armed Forces and veterans in VA facilities. For years, Congress and the federal government have had a vested interest in maintaining a partnership with the tobacco companies. These parties have all clearly profited from servicemembers’ and veterans’ addiction to tobacco. However, the federal government is now eager to repudiate the long-term consequences of its partnership with the tobacco industry and avoid sharing the long-term cost of this past relationship.

A letter from the House Veterans Affairs Committee to the then Acting Secretary of VA, Hershel Gober dated October 31, 1997 provides some extremely important historical background:

- From the time of the Civil War until 1956, the Army was directed by Congress “to cause tobacco to be furnished to the enlisted men of the army at cost prices, exclusive of the cost of transportation, in such quantities as they require, not exceeding sixteen ounces per month” with the cost deducted from their pay. [10 USC 4623].
- The Air Force is still required to provide enlisted men with tobacco [10 USC 9623].
- Free cigarettes were distributed as part of C-rations to servicemembers.
- Tobacco products, in excess of that which could be reasonably consumed by individual servicemembers, were provided to combat veterans.
- Tobacco products continue to be sold by military post exchanges and other military facilities at substantially discounted prices.[DOD IG Report 12/31/96]
- Until the recent year, the military 'culture' encouraged and supported smokers by special smoke breaks (“Smoke'um if you've gottem” and “The smoking lamp is now lit.”).

- Health warning labels on tobacco products sold to the general public began in 1965, but were not mandated for tobacco products distributed through the military system until 1970.
- VA has been authorized since 1933 to provide tobacco to veterans receiving VA hospital or domiciliary care. [38 USC 1715].

Mr. Chairman, we would also call the committee's attention to the fact that generations of Americans have grown up seeing countless newsreels and movies about war in which a wounded serviceman lying on a stretcher or in the mud or snow was given a lighted cigarette. This was an accepted part of first aid on the battlefield to help calm the man's nerves and, equally important, help keep his blood pressure up so that he would not go into shock. The medical use of tobacco in these circumstances was generally understood.

While tobacco use may have been viewed as a 'bad habit,' what was not understood by government and military officials was the true addictive nature of tobacco and the causal link to various types of cancers and other health problems. The information needed by the government to protect its "employees", i.e., the millions of men and women in the Armed Forces, from this health hazard was withheld and covered up by the tobacco industry until very recently. While military officers could order their troops into battle where they could be injured or killed, they did not have the authority to ban tobacco distribution, sales, or use, even if they wanted to.

On a more contemporary note, "Joe Camel," the cartoon advertising character representing the Camel cigarette company and RJR Nabisco, has been declared to be a menace to the health of the nation's young people. As a result, the tobacco company has been forced to withdraw this highly successful and long-running campaign. The American Legion believes the ability of "Joe Camel" to directly influence tobacco use among young people pales in comparison to the federal government's influence exerted in a very direct and personal level by military service.

Tobacco use, usually in the form of cigarettes, was a basic part of daily life whether in peacetime or wartime, stateside or overseas in a combat zone. For most who have served in the Armed Forces, their lives have been changed in many ways by their experiences. Many started smoking while on active duty and have been unable to overcome what is now known to be nicotine addiction. If society is now able to hold the tobacco industry liable for disability and death, why should veterans be denied the right to hold their government similarly liable?

Support of the President's and Congress' proposed legislation would ex post facto the possibility of entitlement to service connection from a group of veterans for an activity which was socially acceptable and encouraged by the veteran's employer which was the federal government. Congress is telling veterans that by their decision 10, 20, 30, 40, 50 years ago to begin smoking while in service, regardless of the circumstances - wartime or nonwartime, they essentially "forfeited" their future right to government disability benefits and medical care and their family's rights to survivor benefits as well. We also believe that, if successful, VA would similarly go after those veterans who are currently service connected for a psychiatric condition, such as PTSD, ("shell shock", or "combat fatigue") for whom smoking is a symptom of their service connected disability. If they should in the future develop a tobacco-related disease, VA would not provide either additional compensation or medical care.

Mr. Chairman, there is the very real danger that Congress may come to view the VA budget as a potential source for future raids and whittle away programs which they or VA consider to be too expensive or too complex. For years the tobacco industry has known the true scientific and medical facts about tobacco use and nicotine addiction, i.e. that it did cause cancer and other respiratory conditions. Industry officials are only now grudgingly admitting that this information was kept secret while tobacco products were manipulated to maximize their addictive effects. Historically, the tobacco companies, individually and as an industry, have repeatedly lied to the public, the courts, and the Congress about the relationship of tobacco to certain diseases.

Legal action against the tobacco companies by private citizens was consistently unsuccessful until the last several years. Veterans faced a similarly situation with the VA and now Congress wants to change the "rules of the game," rather than meet its responsibility and "do the right thing for veterans."

The Administration has not been pro-active in aggressively pursuing a "global" or comprehensive federal settlement with the tobacco companies to fund the current and future costs to VA, DOD, HHS including Medicare and Medicaid, and the Indian Health Service for tobacco-related illnesses. VA has advocated such action. Efforts by the administration and Congress have been limited to trying to obtain some portion of the state-initiated legal settlement with the tobacco companies. This strategy may only cause the states' settlement to be delayed or to fail. Even if successful, we do not believe the funds would be adequate to meet the needs of the several federal agencies affected by tobacco-related diseases.

Finally, we believe that if Congress and the administration were truly sincere about the tobacco use among veterans and the overall costs to the federal and state governments, as well as individuals and families of those suffering from tobacco-related diseases, Congress would act promptly and decisively to eliminate the current tobacco subsidies and immediately terminate the sale and distribution of tobacco products at military facilities. In addition, Congress would also eliminate other heavily subsidized products from military facilities like alcohol, that can also contribute to ill health and can be attributed to "willful misconduct."

The administration and Congress, however, much to our disappointment would rather penalize certain sick and disabled veterans than to submit an honest, realistic budget acknowledging the federal government's legal and moral obligation to those veterans who become sick and die from tobacco-related disease which can be directly linked and traced to their period of military service. Having identified its true future budget needs, the federal government would also take the necessary legal action against the tobacco companies in order to achieve an appropriate comprehensive settlement. The Congress' failure to act leaves programs that benefit millions of our citizens at financial risk. What will happen to veterans is only the first step towards large-scale cutbacks in services and lost benefits.

Mr. Chairman, this concludes our statement.

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**PREPARED STATEMENT OF DAVID W. GORMAN,  
EXECUTIVE DIRECTOR, WASHINGTON OFFICE OF THE  
DISABLED AMERICAN VETERANS**

Mr. Chairman and Members of the Committee:

I am pleased to appear before you on behalf of the more than one million members of the Disabled American Veterans (DAV) and its Women's Auxiliary to present our views on compensation for tobacco-related illnesses.

As you know, the President brought this issue to the forefront by proposing legislation to prohibit service connection for illnesses resulting from smoking. Now, many in Congress have also found this proposal attractive because they are eyeing the savings for their own favored programs. As an organization devoted to the welfare of America's service-connected disabled veterans, the DAV is particularly alarmed by both the injustice and primary motive of this unwarranted assault on veterans' compensation. We are disappointed that so many of our elected representatives find the money they could take from veterans' programs so alluring they

would readily, thoughtlessly, nonchalantly, and callously abandon our Nation's disabled veterans. The DAV strongly opposes the Administration's recommendation to prohibit service connection as well as the proposals to use the savings for other Government programs.

How quickly and conveniently we seem to have forgotten that, until the decade of the 90s when the anti-smoking campaign became in vogue, smoking was considered socially proper and deeply ingrained in our customs and culture. Native Americans grew and used tobacco, and smoking has been prominent in the American culture since the colonists first settled in the New World. Tobacco has been one of our country's major crops and products throughout our history. In 1613, John Rolfe sent the first shipment of Virginia tobacco from Jamestown to England. Thereafter, its use spread throughout Europe. From that time to the present day, growing tobacco and manufacturing its products has been one of our leading industries. Commerce in tobacco has therefore been a very important part of our economy, and our Government has unhesitatingly reaped untold taxes on tobacco products. Cigarettes have been one of our country's major mass-marketed products since the 1920s. Citizens across all socioeconomic levels have used tobacco for pleasure or have been enticed by its glamorization and romanticization in books, motion pictures, and in our society generally. Only recently, has there been a serious shift in public attitude about smoking and serious proposals to regulate tobacco for public health reasons.

Smoking has traditionally been even more prevalent among members of our Armed Forces. The Department of Defense has been perhaps our Nation's largest distributor of cigarettes. The Department of Defense has long been in the business of discounting tobacco products and subsidizing smoking among servicemembers. In past years, many of the images of soldiers included cigarettes dangling from their mouths. Cigarettes were an integral part of military life. Survey data compiled in connection with a study for the Department of Veterans Affairs (VA) showed that over 70% of veterans, as compared to about 50% of the U.S. adult population, had a history of smoking. Findings from that study indicated that a significant proportion of veterans started smoking while on active duty. The higher incidence of smoking among veterans can be explained by a military environment and culture that encouraged and facilitated smoking.

Those of us who served in the Armed Forces know that smoking was much more of a social activity in the military setting than it was in civilian life. Part of that was due to the inherent nature of the military environment, and part was due to the military's own use of



tobacco as a small and relatively inexpensive but effective way to help servicemembers cope with that difficult environment.

During rigorous training and combat operations, smoking often provided the only opportunity for a brief distraction or escape from the stresses or drudgery of the moment. Smoking provided the only coping tool immediately accessible. Drill instructors and others in control of military units used smoking as the activity for occupying servicemembers during breaks. Servicemembers looked forward to those breaks as their only respite and pause from combat and the rigors of military training and duties. Smoking was also an ever-present part of the restricted social activities available to servicemembers in isolated military settings.

Perhaps it was for these reasons that the military establishment became a partner with the tobacco companies in distributing cigarettes and promoting tobacco use among members of the military services. It is well-established that the Armed Forces, under various legal authorities, provided rations of tobacco to servicemembers. Free cigarettes were provided to them during combat tours. Free cigarettes were included in C-Rations, and, as I noted previously, cigarettes were provided at substantially discounted prices in military exchanges. Thus, we can accurately state that smoking was not only fully approved of by the Armed Services, it was encouraged and facilitated by the military on a level probably unparalleled anywhere else in our society.

Like the recent groundswell of anti-tobacco sentiments, the Government's opposition to tobacco-related benefits for veterans is of recent advent and, within VA, represents an abrupt—and convenient—reversal of policy. Given the Government's complicity in tobacco use among veterans, VA's self-righteous hypocrisy and the Government's ulterior motive for enacting this legislation becomes all the more reprehensible. Let me now review the long-standing law and VA policy on disabilities related to smoking, along with recent developments, in the context of laws governing compensation generally.

Under the law, service connection is awarded for any disability incident to service. Disabilities due to willful misconduct are an exception to that rule, however. "Willful misconduct" is "an act involving conscious wrongdoing or known prohibited action." It means a deliberate or intentional act with "knowledge of or wanton and reckless disregard" of its probable consequences. Tobacco use has never been a prohibited action. On the contrary, as noted previously, tobacco use was fully authorized and approved by the military. VA has held expressly that tobacco use is not willful misconduct. In 1964, Administrator's Decision No. 988 pointed out that smoking is

not deemed willful misconduct by VA. The Omnibus Reconciliation Act of 1990 amended sections 105(a), 1110, and 1131 of title 38, United States Code, to include “abuse of alcohol or drugs” as disabilities for which service connection is barred. However, smoking did not fall within the definition of drug abuse for VA purposes. In that application, “drug abuse” means use of *illegal* drugs, use of illegally or illicitly obtained *prescription* drugs, intentional use of prescription or non-prescription drugs for purposes other than their *medically intended* use, and use of substances to enjoy their *intoxicating* effects.

It would be the height of hypocrisy for Congress or VA to declare smoking misconduct when VA provided free tobacco to hospitalized veterans under authority of a statute enacted by Congress, a law that has not been repealed. To do so would suggest the Government itself abetted misconduct.

The issue of service connection for smoking-related disability arose during oral argument before the United States Court of Veterans Appeals (Court) in a case in which the veteran was claiming service connection for lung cancer on the basis of radiation exposure. Counsel for the Secretary of Veterans Affairs argued that the veteran’s lung cancer was due to smoking rather than exposure to radiation during service. Counsel for the appellant responded that, assuming *arguendo* that the lung cancer was due to smoking, the veteran should be service connected for lung cancer on that basis, inasmuch as the veteran smoked for 14 years during service and for only 10 years after service. Writing separately, one of the judges opined that the veteran could pursue service connection on that basis on remand:

Also at oral argument, the appellant’s representative raised for the first time an argument that, in determining whether the appellant’s lung cancer is service-connected, the 14 years of smoking in service should be considered along with the inservice radiation exposure. Under such an approach, the only evidence against service connection would be the 10 years of smoking after discharge until the lung-cancer diagnosis was made. The VA regulations provide that service connection must be denied in such a situation if “a supervening nonservice-related condition . . . is more likely the cause of the disease” than the inservice activity. 38 C.F.R. § 3.311(g) (1989).

The appellant may be able to introduce on remand both or either of these arguments and evidence in support of them . . . .

*Sawyer v. Derwinski*, 1 Vet.App. 130, 138 (1991) (Steinberg, J., concurring).

While *Sawyer* was still before the Board of Veterans' Appeals (BVA or Board) on remand, an independent medical expert provided an opinion that smoking was probably the primary cause of the veteran's pulmonary carcinoma in another case then pending before BVA. The Board solicited a General Counsel's opinion in that case. In Op. G.C. 2-93 (1993), the General Counsel held:

1. Determination of whether nicotine dependence, per se, may be considered a disease or injury for disability compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles relating to that condition.
2. Direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service.
3. A determination of whether tobacco use constitutes willful misconduct for purposes of determining whether disability or death may be considered to have resulted from injury or disease incurred in line of duty depends upon whether the evidence in the particular case establishes that the veteran engaged in deliberate or intentional wrongdoing and either knew or intended the consequences of tobacco use or used tobacco with a wanton and reckless disregard of its probable consequences. However, tobacco use does not constitute drug abuse within the meaning of statutes providing that injury or disease will not be considered incurred in line of duty where it results from abuse of drugs.

Service connection was conceded in *Sawyer* and the case in which the General Counsel issued his opinion.

In his May 5, 1997, response to a request from the General Counsel for an opinion, the VA's Under Secretary for Health indicated that nicotine dependence may be considered a disease. Another VA General Counsel's opinion, Op. G.C. 19-97 (1997), reaffirmed the

principle that service connection may be established for smoking related disabilities. The General Counsel held:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.

VA has since offered a draft bill to amend title 38 by adding a new section to chapter 11 providing as follows:

(a) *Notwithstanding any other provision of law*, a veteran's disability or death shall not be considered to have resulted from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service for purposes of this title on the

basis that it resulted from injury or disease attributable *in whole or in part* to the use of tobacco products by the veteran during the veteran's service.

(b) Nothing in subsection (a) shall be construed as precluding the establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated in active military, naval or air service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of this title.

(Emphasis added.) VA has justified this change in law by arguing that the Government should not compensate veterans for disability resulting from the personal choice to smoke. Although it is clear that this language, if enacted, would unfairly preclude service connection for a disability related to smoking when the disability first manifests after service or any presumptive period otherwise applicable to the particular type of disability, it is unclear what effect the law would have in other circumstances. Indeed, because of the uncertainty of the effect of this proposal, it is difficult to understand how its savings have been projected by VA and the Congressional Budget Office.

Because of the lack of clarity in the draft language, I must discuss its probable, albeit uncertain, effect. Subsection (a) precludes, "notwithstanding any other provision of law," service connection for disabilities attributable "in whole or in part to the use of tobacco products by the veteran during the veteran's service." The phrase "notwithstanding *any other* provision of law" would appear to preclude service connection in any instance in which tobacco was the sole or partial cause of the disability, including the circumstances described in subsection (b). However, that would make subsection (b) essentially superfluous in that it would do nothing more than announce the obvious—that the law applicable to disabilities unrelated to smoking still applies. VA has explained that the intent is to only preclude service connection for smoking-related disabilities that do not manifest during service or within any presumptive period applicable to the type of disability; that is, service connection would still be awarded for smoking-related disabilities that manifest during service or during an applicable presumptive period. As I will explain below, that is incongruent with VA's general premise that a disability should not be compensated if it is smoking related. The "in whole or in part" language adds another complication and makes the effect even more inequitable.

A veteran who, for example, claimed service connection for lung cancer under the presumption in section 1116 of title 38, United States Code, based on exposure to a herbicide agent might be denied service connection because of a history of smoking from which the lung cancer could not be medically disassociated. VA responds to that concern by stating that the intent is to no longer allow service connection “on the basis that” a disease resulted in whole or in part from tobacco use. In other words, service connection would be prohibited in instances where the *only* way it could be established is on the basis of tobacco use. That interpretation presents its own problems in that it suggests that one of two identically situated veterans could be granted service connection if he or she simply based his or her claim on agent orange while the other could be denied service connection merely because he or she based the claim on smoking although both were exposed to agent orange and had identical smoking histories. This also again suggests that subsection (a) precludes service connection for tobacco-related disabilities in every instance, regardless of whether they manifested during service, a presumptive period, or beyond service and presumptive periods. That in turn again makes subsection (b) mere surplusage because it would articulate the proposition that the law as it otherwise applies still applies.

Another troubling question is the effect of the law on survivors seeking dependency and indemnity compensation (DIC). It is quite possible that, in cases where veterans die of service-connected disabilities, VA could look behind the decisions that established service connection for the veterans to make after-the-fact determinations that smoking was a contributor to the disabilities and thus the deaths as a way to deny DIC.

Now, assuming that VA does not intend the law to prohibit service connection for tobacco-related disabilities that appear during service or a presumptive period, I will discuss the contradiction between VA’s proposed legislation and the premise that service connection should not be established for smoking-related disabilities because they result from a personal choice. The connection between a disability and military service can be established in essentially four different ways: (1) the disability manifested or was aggravated during service, (2) the disability manifested to such a degree within a short time after service that it is assumed service connected under a statutory presumption, (3) the disability with a typically delayed onset first clinically manifests after service and any presumptive period but is shown to be from exposure or causes attributed to service, or (4) the disability is the secondary result of a service-connected disability. Disabilities due to radiation exposure, post-traumatic stress disorder,

and almost any other condition characteristically of delayed onset can be established as service connected under the third method. Purportedly, VA's proposal would not preclude service connection for tobacco-related disabilities under the first two methods. Accordingly, the proposal would seek only to bar service connection under the third and fourth scenarios. If the disability from smoking in service became evident during service or within any presumptive period applicable to the particular disability, service connection would be in order, but if the disability due to smoking during service or nicotine addiction of service origin did not manifest until some time after service and any applicable presumptive period, service connection would not be in order.

In short, it is nothing more than the timing of the onset of ascertainable disability that VA for some inexplicable reason finds objectionable, rather than the fact of a personal choice to smoke. Casting more doubt on VA's "personal choice" reason for this legislation is the fact that VA proposes no change in law to preclude disability pension where smoking is responsible for the disability. VA's proposal and its stated justification are incongruent. If the division were between the veterans of today and the veterans of tomorrow, it would then be based on the absence or presence of a fully informed and conscious choice.

Any proposal to prohibit service connection for today's veterans is inequitable and inconsistent with the Government's position on who is responsible for the adverse health effects of smoking. During decades of litigation, the cigarette manufacturers paid not even a single dollar in damages for the injurious effects of smoking. They successfully invoked the defense that smokers were personally responsible for the consequences of smoking because they "assumed the risk" by knowingly using a potentially harmful product. Those suing the tobacco companies persisted, nonetheless, and that defense is no longer recognized as viable because it has come to light that the tobacco companies concealed from consumers much about the injurious and addictive effects of tobacco use.

It is on the premise that the cigarette manufacturers, and not smokers, are responsible for the effects of smoking that the state governments and the Federal Government are now poised to recoup from the tobacco industry billions of dollars for costs of tobacco-related health care provided to government beneficiaries. Yet, the Clinton Administration disingenuously seeks to invoke the very defense the government rejected as an excuse for depriving veterans of compensation.

While the Government's position rests on the premise that these consumers cannot themselves be held responsible for their own

tobacco use inasmuch as they were not undertaking a potentially harmful activity with full knowledge of its risks and probable consequences, the President's proposal here, on the other hand, rests on a contrary premise. The contrary premise is that veterans were somehow in a position of knowledge and understanding superior to that of all other consumers and thereby voluntarily exposed themselves to a known danger of which they appreciated the nature and extent and thus must be held personally responsible and not entitled to compensation.

We are unaware of any proposal to prohibit other Government benefits on the this basis. For example, disability and health care benefits will continue under other Federal programs even though smoking may have played a role in causing the illness and disability.

Accordingly, considering that smoking was encouraged by the Armed Forces with the result of a higher incidence of smoking among veterans, considering that veterans were no more aware of the inherent risks of smoking than the general public, and considering that no other Federal programs are proposing to prohibit disability or medical benefits for conditions related to smoking, no rational basis exists for holding veterans to a different standard and singling them out for disparate and punitive treatment.

Certainly, the DAV agrees that anyone entering military service today should be deemed to have full knowledge of the risks of smoking. We would not oppose a change in law to prohibit service connection for disabilities shown by clear and convincing evidence to have been caused by smoking alone if the law applied to persons who enter military service on or after the date of enactment of the law.

Although this is the more rational and fair approach to the problem, we realize it will unlikely receive serious consideration simply because it would not yield large sums of money for other programs. Unfortunately, that is the overriding motive responsible for Congress' urge to enact this legislation. That is made clear by the Senate Budget Committee's adoption of the President's recommendation without any meaningful deliberation or dialogue on its effects or merits. Some have urged us to support this legislation, promising to work diligently to get all of the savings for veterans' programs. Given that the momentum of this initiative in Congress is money for other purposes, Congress is highly unlikely to enact this prohibition just to give the money to veterans' programs. The DAV opposes the legislation on principle and would not support it even if guaranteed that all of the savings would be reinvested in benefits and services for veterans. Congress should provide VA much more funding than the levels proposed in the President's fiscal year 1999



budget, but that funding should not come from unjust changes elsewhere in veterans' programs.

For these reasons, the DAV strongly opposes the Administration's self-serving proposal to prohibit service connection for smoking-related illnesses. We oppose the frenzied action of many to enact this legislation, not on its own merits, but merely to obtain its savings for various personal causes. We urge this Committee to strongly reject the Administration's proposal and oppose any action on it by Congress.

Finally, in regard to the tobacco settlement, the DAV certainly believes that the Federal Government should seek damages from the tobacco industry for the costs of health care provided to veterans and other Federal beneficiaries. However, such damages should not be counted in setting funding levels for veterans' benefits. The costs of disability compensation are solely the Government's obligation, and funding for veterans' compensation should never be subject to or dependent on the availability of non-appropriated monies from private sources. Similarly, considerations on funding for veterans' health care should not involve amounts collected from the tobacco companies. To the extent that a portion of the tobacco settlement could be used to enhance VA health care or research programs without any offset of appropriations, it would be a wise and warranted investment of the monies.

This concludes DAV's testimony on these matters. We appreciate the opportunity to present our views, and we again strongly urge you to reject the President's proposal to change the law on service connection for tobacco-related illnesses and oppose any efforts in Congress to make such change.

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**PREPARED STATEMENT OF GORDON H. MANSFIELD,  
EXECUTIVE DIRECTOR, PARALYZED VETERANS OF  
AMERICA**

Chairman Specter, Ranking Minority Member Rockefeller, members of the Committee, on behalf of the Paralyzed Veterans of America (PVA) I appreciate the opportunity to testify before this Committee regarding the Administration's proposal to deny benefits to disabled veterans. This proposal was brought forth last session, and this year is contained in the Administration's Fiscal Year 1999 budget request. PVA opposed this proposal last year, and we oppose it once again this year.

The Administration's proposed addition to title 38 states that "[n]otwithstanding any other provision of law, a veteran's disability

or death shall not be considered to have resulted from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable in whole or in part to the use of tobacco products by the veteran during the veteran's service." The General Counsel of the Department of Veterans Affairs (VA) issued an opinion in 1993, and reaffirmed this opinion in 1997, that found that veterans could have a cognizable claim under title 38 for disabilities resulting from tobacco use during service in the Armed Forces. The VA, and the Administration, are now attempting to rewrite history to quash benefits for veterans.

The Administration has not advanced a legally persuasive, nor a logically compelling rationale upon which to deny benefits to these veterans. In fact, the only rationale we have been able to ascertain is solely and simply the supposed cost involved in granting these benefits. If the Administration is successful, this would mark the first time that benefits given to veterans would have been taken away just because, in the view of some, they cost too much. The Administration has estimated that granting these benefits would cost \$17 billion over the next five years. The Congressional Budget Office has estimated this figure at \$10.5 billion. PVA believes both of these figures to be inflated, and the VA's arguments that they will be flooded with claims to be overwrought. According to recent VA testimony, approximately 6000 tobacco-related claims have been tiled. Out of this number, approximately 200 have been allowed and over 2000 have been denied. It would certainly seem that to prove these claims is indeed a difficult burden to meet.

If the Administration's proposal was simply a matter of the proper interpretation of applicable statutory provisions it would be one thing. But as the Administration proposes to take benefits from veterans, it then wants to go ahead and spend what it proposed to save on other non-veteran programs. According to the FY 1999 budget request, a small fraction of this estimated \$17 billion would be returned to veterans.

But it is not just the Administration that is looking to rob veterans to give money to others. Congress itself is now in the process of following suit. The Senate Budget Committee, in its FY 1999 budget resolution, took the "savings" premised on passage of this proposed legislation to provide billions of dollars more than the amount agreed to last year in the Balanced Budget Act to a bloated highway bill. Veterans have contributed billions of dollars already for deficit reduction, more perhaps than any other group. Now Congress plans to deny an entire class of veterans benefits just to increase spending in other areas and break the budget agreement in doing so. We also

find it inexplicable how Congress could eliminate an entitlement that falls under mandatory spending and then spend those savings on transportation programs that are discretionary spending.

The government through the Department of Defense has direct liability in veterans tobacco-related disability claims. Tobacco use has been inexorably intertwined with military service. Perhaps in no other segment of our society was tobacco use such a part of the culture, and so actively promoted by the very government that now seeks to slash benefits to veterans. A significant number of veterans started smoking when they were in military service. Studies have shown that there is a higher incidence of smoking and tobacco-related illnesses among veterans than in the civilian population.

It is ironic that at the same time the Administration is attempting to gain further control over tobacco by regulation, and as it seeks to obtain a global settlement with tobacco companies, that veterans are being told that they are somehow different from the general population - that they do not suffer from the same addictive properties of nicotine - that they should be denied compensation because the government wants to use these resources to build a road or a thoroughfare, a spur or a freeway. Veterans would not be accorded the same treatment as other Americans because Congress desires to turn mandatory spending into discretionary spending. If Congress turns its back on veterans in this way, other Americans receiving Social Security disability for smoking related diseases will still receive their benefits.

Passage of the proposed termination of tobacco related disability compensation may have drastically broader implications than just eliminating compensation for disabilities, directly associated with smoking. The bill goes far beyond that to include disabilities which could be associated "in whole or part" from tobacco use. PVA fears that with passage of this legislation, many veterans may be denied earned disability benefits for a broad range of disabilities simply because they might have once smoked. In this instance the intent of this legislation is far more sinister than it may appear on the surface.

This is not the only attack on veterans programs this year. The proposed FY 1999 budget actually reduces outlays for the VA health care system by \$140 million. It also continues the trend, adopted in the budget agreement, to freeze appropriations for the next four years. Third party reimbursements are not sufficient to make up this gross loss in revenue for the VA health care system. Potentially this problem is falling on deaf ears in the Congress particularly with the Budget Committee in the Senate. Coupled with these cuts in benefits proposed for service-connected disabled veterans, these actions mark one of the most anti-veteran proposals to come before the Congress in

recent history. We are going to need all the help we can get from the members of this Committee to turn these proposals around.

In closing, PVA finds the Administration's proposed legislation to deny benefits to disabled veterans, and Congress' apparent complicity in this scheme to be outrageous.

With no rational nor legal justification to cut benefits currently being granted, it is clear that this is all about money. It is all about taking money from veterans simply using this tobacco issue as an excuse to find a way to break the budget agreement and inflate spending for other uses. PVA strongly opposes enactment of this legislation.

Thank you Mr., Chairman. I will be happy to respond to any questions you may have.

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**PREPARED STATEMENT OF KENNETH A. STEADMAN,  
EXECUTIVE DIRECTOR, VETERANS OF FOREIGN WARS**

It is a distinct honor to be here today to represent the over two million men and women of the Veterans of Foreign Wars at this important hearing. Let me say at the onset the VFW is opposed to the Administration's proposal to deny veterans compensation for sufferings from tobacco-related disabilities. Our members have gone on record by resolution adopted by our National Convention opposing this proposal.

In years gone by cigarettes were distributed free of charge to members of the Armed Forces as part of the food and sundries packets referred to as "C-rations." Tobacco products have been and continue to be sold by military exchanges at substantially discounted rates, thus actively encouraging tobacco usage by military personnel, and as late as 1996 commissary tobacco prices were as much as 76 percent lower than commercial retail prices.

The military culture historically has recognized, encouraged and supported cigarette smoking by service members. It is for this reason that a significant number of veterans began smoking during military service. For example, reliable studies indicate that 75 percent of World War II veterans began smoking tobacco products as young adults during the course of their military service.

Labeling requirements warning of the addictive nature of nicotine and the dangers of tobacco-related products, which were applicable to tobacco products sold in the commercial market, were not mandated for products distributed through the military system until 1970, five years after the requirement was applied to products sold in the civilian market.

It is for this reason the VFW holds that smoking related claims should be adjudicated in accordance with the very same evidentiary standards that are applied to other VA benefit claims. The administration proposal would effectively treat smoking as a form of “willful misconduct” in order to deny compensation. We deem it intolerable to equate a veteran’s use of tobacco with drug and alcohol abuse as is proposed. Further, the administration’s assertion that some \$17 billion would be saved over 5 years (now estimated at \$10.5 billion by CBO) by imposing such a ban is a callous and calculated exaggeration. Since the previous moratorium on smoking related claims has been lifted, only an additional 3219 claims have been filed for a total of 7,419. Of these 3,370 have been adjudicated and just 278 granted compensation.

Another serious problem with this proposal is that it could result in the wrongful denial of compensation to veterans who are or have been smokers. For example, a Persian Gulf veteran who develops lung cancer due to toxic exposures incidental to Gulf service who also smokes could be denied warranted compensation under this proposal. This is because it provides that claims may be denied that are “attributable in whole or part to the use of tobacco products by the veteran.” The VFW deems this to be totally unacceptable.

One final point, if for some reason and despite our firm opposition a ban on smoking related claims is enacted into law, the VFW would insist that any related savings be used to bolster VA and not to pay for non-veteran related programs. The Veterans Health Administration is suffering from two decades of under funding while the Veterans Benefit Administration remains overwhelmed by a backlog of 400,000 claims.

Veterans have willingly sacrificed both in uniform and in civilian life for the good of the nation. Their willingness to tolerate years of inadequate VA health care funding and severe program cuts under successive reconciliation actions has certainly contributed toward achieving the reported budgetary surplus in this fiscal year. To penalize them again now by applying savings realized by reducing their benefits to non-veteran initiatives would be wrong and an egregious affront to their service.

In a related matter, while the VFW strongly supports the Administration proposal to increase the Montgomery GI Bill education benefit by 20%, we object to the fact that this would be paid for by denying compensation for smoking related disabilities. There is no doubt that the GI Bill benefit should be increased and increased now. There has been no significant increase since the program’s inception and will now only cover 38% of the cost of a public college or university. But to fund this increase by denying other veteran’s

legitimate benefit claims is just plain wrong. The VFW urges the Congress to appropriate the funds needed to provide for this long overdue veteran's educational benefit increase.

The last issue I will briefly address here today relative to veterans and smoking pertains to the so called "global tobacco settlement." There may be no doubt that smoking related disabilities have placed a tremendous strain, measured in dollars, FTEE and other medical resources, on the Veterans Health Administration. This has undoubtedly contributed mightily to the system's current budgetary woes. We contend that VA and veterans should be first at the table if any settlement finally emerges.

Mr. Chairman, this concludes my statement. I respectfully request that my full statement be included in the hearing record, and I will be happy to respond to any questions you may have.

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**PREPARED STATEMENT OF WILLIAM F. RUSSO,  
DIRECTOR, VETERANS BENEFITS PROGRAM, VIETNAM  
VETERANS OF AMERICA**

**INTRODUCTION**

Chairman Specter and members of the Senate Veterans' Affairs Committee, on behalf of Vietnam Veterans of America (VVA), I am pleased to have this opportunity to present our views on the President's proposal to eliminate veterans benefits for tobacco-related illnesses. This is perhaps the most critical issue this Committee and the veterans community will address this year. VVA is very disturbed by the turn of events during the last several weeks. And we urge this Committee to hold true to America's veterans on the principles surrounding VA disability compensation.

**SMOKING CLAIMS SHOULD NOT BE BARRED**

Current law and VA policy allow for compensation of tobacco-related illnesses on the premise that nicotine addiction is not "willful misconduct," and that many veterans' began smoking while serving in the U.S. military. VVA is very disappointed with the position the Administration and certain members of Congress have taken with regard to compensating disabled veterans whose illnesses may result from tobacco. We urge you to reject this legislation which would bar a claimant from receiving compensation from the Department of Veterans Affairs' (VA) for tobacco-related illnesses.

The Administration's position on this issue seems contradictory at best and outright illogical at its worst. While its officials are advocating that the Food and Drug Administration (FDA) be given broad authority to regulate tobacco products as a mechanism to dispense the highly addictive drug nicotine, they also seem to assume that veterans were somehow immune to the addictive nature of this drug.

The very premise upon which the much publicized "tobacco settlement" between the states and the tobacco companies is based, is that the public was an innocent victim because the tobacco industry conspired to increase nicotine in their products and withhold scientific evidence of its addictive nature. These companies also withheld evidence of tobacco's other harmful health effects. Yet, this proposed legislation implies that those who began smoking in the military were somehow supposed to have greater knowledge of the danger than did the general public, and more willpower to withstand the addictiveness of nicotine.

While American society was also exposed to the barrage of tobacco advertising and glamorization of smoking by entertainers and sports figures, no other sector was force-fed tobacco products in the same manner as military veterans. The Department of Defense (DOD) distributed these products to service members free of charge at basic training, within K- and C-rations in the field, and at substantial discount in military exchange stores. Young recruits were encouraged to smoke by their drill instructors as an incentive and reward for good performance. We are aware that studies show higher rates of smoking -- and consequently greater incidence of tobacco-related illnesses -- among veterans than the civilian population.

Contrary to the position the Administration has taken on this matter, we believe that veterans should not be denied disability benefits in cases where the federal government is clearly culpable. Nicotine addiction and related illnesses suffered by veterans fall into this category. Again, the military did much more than tolerate smoking among its ranks -- it irrefutably encouraged and subsidized smoking. In effect, DOD was the drug pusher for the tobacco companies.

VVA has heard some argue that smoking is a choice made by individuals, and the government should not compensate veterans for making this choice. We will concede that smoking the initial cigarette may have been a choice made by veterans -- though the military culture was a very strong influence encouraging the individual to make this choice. However, no one -- veteran or non-veteran -- chose to become addicted to cigarettes. According to new evidence becoming publicly available through litigation, the tobacco companies

manipulated the nicotine levels and conspired to hide evidence of the dangers of cigarettes and nicotine addiction. Therefore, the tobacco companies, with the unwitting assistance of DOD, made the choice to create tobacco addictions in the military and veterans populations.



## **THE INTEGRITY OF THE VA SYSTEM**

VA and OMB purport that there will be a widespread public outcry about the overgenerousness of providing disability benefits to veterans who smoked. We flatly disagree, believing instead that the American public would be outraged at the role the federal government played in causing veterans to be addicted to tobacco products and became ill as a result. We welcome the opportunity to educate the public on this issue. Moreover, we note that no other class of federal beneficiaries (such as Social Security Disability Insurance) are barred from benefits for smoking-related diseases. Veterans should not be treated in a lesser manner than other federal benefits recipients.

Veterans should not be denied disability benefits and health care merely because it might be unpopular. Next, the Administration might propose or Congress might implement a bar on claims for disabilities which allegedly result in part from a poor diet or lack of exercise. Eventually, Congress might bar claims for injuries suffered in an unpopular war. This is a very dangerous precedent to set.

## **PROPOSED LEGISLATION WOULD AFFECT OTHER VA BENEFITS**

The language of this proposed legislation would bar VA from granting any service-connected disability claim "on the basis that it resulted from injury or disease attributable in whole or in part to the use of tobacco products by the veteran during the veteran's service." This language may be intended to bar only those claims alleging that a disability resulted from smoking, but it might well cause VA to deny other claims as well. For example, a veteran who develops cancer in service as a result of exposure to toxic chemicals, might have his claim denied if a VA doctor reports that his cancer may be partly the result of his cigarette smoking. Notwithstanding the attempted clarification on this point by VA's Acting General Counsel (in his March 24, 1998 letter to House Veterans' Affairs Committee staff), the proposed legislation is vague enough that VA staff could very likely apply it inequitably to deny such claims, forcing veterans into years of appeals.

Additionally, veterans denied service connection as a result of this legislation will have less priority for VA health care. Some in Congress have stated their support for a prohibition on compensation for tobacco-related illnesses, saying that veterans should instead be provided health care for these conditions. Because the two benefits are interrelated, though, and because this legislation contains no

provision to ensure health care priority for tobacco-related illnesses, we are afraid these veterans would also be denied these benefits.

### **ESTIMATED SAVINGS ARE EXAGGERATED**

As representatives of America's veterans, we further believe that the position taken by VA the Office of Management and Budget OMB and the Congressional Budget Office CBO on this issue is entirely incorrect and is based on erroneous, hypothetical calculations. VA projects that a half-million smoking claims will be filed in the next year and assumes most will be granted.

Actually, these claims are very hard to win, since a veteran must prove (with medical evidence) that their disease is the result of smoking in service, or smoking after getting addicted to cigarettes in service. In fact, according to statistics provided last week by Under Secretary for Benefits Joseph Thompson, only 7,419 smoking claims have been filed over the past 5 years. Of those which have been adjudicated, less than 10% have been granted. (VA's prediction that "the bulk of these claims may be resubmitted when claimants and their representatives meet identified requirements," as stated in Mr. Thompson's March 23, 1998 letter to the veterans service organizations, is vague and unsubstantiated.) There is simply no evidence to support the VA's predictions on either the number of claims which will be filed or the number which will be granted.

### **FUNDING SHOULD NOT BE TRANSFERRED TO NON-VETERAN PROGRAMS**

Talks of a budget surplus -- in an election year, no less -- seem to create a feeding frenzy, in which different interest groups outside and inside Congress are positioning themselves to get a piece of the pie. At the same time, VA and veterans programs are struggling to keep afloat.

The revelation in recent weeks that Congressional leaders are considering the President's proposal to eliminate veterans benefits for tobacco-related illnesses, in order to divert these funds to election-year transportation spending, is an absolute outrage. VVA is strongly opposed to any election year attempts to increase transportation spending by building these new pork-barrel transportation projects on the backs of disabled veterans.

It is our understanding that the transportation bill will not contain cost offsets, and therefore individual members will be shielded from voting directly against veterans benefits. The conference committee is expected to add offsets, including savings from barring veterans

smoking claims. It will then be difficult for the House and Senate to strike the provision barring these claims. Such closed door decision-making is shameful, political deal-making at its worst. VVA strongly urges the Veterans' Affairs Committees to block any and all efforts to eliminate veterans benefits for smoking-related illnesses.

## **CONCLUSION**

Proponents of this legislation rely on three main arguments: paying compensation for smoking related diseases will be 1) inconvenient, 2) expensive and 3) unpopular. As stated above VVA does not believe that keeping the status quo would cause any of these predictions to come true. Many fewer claims have been filed, and granted, than VA has predicted. Moreover, the facts show that the military pushed a dangerous, addictive drug on its troops. Therefore, veterans must be fairly compensated for smoking related diseases.

In addition to being unfair, VVA believes the proposed legislation is illegal, since it violates the Equal Protection Clause of the U.S. Constitution by treating one class of veterans (those seeking service connection for smoking related diseases) different from other veterans seeking service connection. It also treats veterans differently than other federal claimants seeking benefits for smoking diseases, as noted above.

We are aware that the DOD has already made claim to a portion of the "tobacco settlement," and we urge the Administration to advocate more aggressively for a federal government stake in the dividends. Through Medicare, Medicaid, the Public Health Service, Indian Health Service, Veterans Health Administration and the military health care system, the federal government has paid huge sums of taxpayer money for tobacco-related medical care costs. These agencies have expended a level significantly higher than the state-administered Medicaid programs. As such, the federal government should receive an appropriate sum from any "tobacco settlement" to recoup the medical care costs. We would advocate that whatever sum might be distributed to VA be used for medical care and research for tobacco-related illnesses.

VVA urges Congress to stop this legislation immediately. We should be spending time and energy working on improved benefits for veterans, not diminishing them.

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**PREPARED STATEMENT OF CHUCK BURNS, NATIONAL  
SERVICE DIRECTOR, AMVETS**

Mr. Chairman, my name is Chuck Burns. I am the national service director for AMVETS. Neither AMVETS, nor myself, has received any federal grants or contracts during the fiscal year 1998 or in the previous two fiscal years.

We appreciate the opportunity to present our views on the Department of Veterans Affairs proposed legislation to deny paying compensation to those veterans with illnesses related to their use of tobacco, while on active duty.

Much water has gone under the bridge since my organization first testified on this issue last summer before this committee and the House Veterans Affairs Committee. At that time, AMVETS and the rest of the veterans' community recognized that this issue was a "ticking time bomb" for VA and urged VA's participation in the ongoing tobacco settlement talks. We have seen a great deal of smoke from VA on this matter, but very little fire to indicate their willingness to become an active participant in these negotiations.

The FY 99 Veterans Affairs budget submission is the latest example of VA's unwillingness to acknowledge their responsibility to compensate and care for those men and women injured as a result of their willingness to serve in the uniform of this nation.

VA's refusal to pay compensation for tobacco related-illnesses stems from one of two misguided notions. The first would equate tobacco addiction with willful misconduct. This is totally unacceptable by AMVETS, and VA itself has said that smoking is not willful misconduct, yet the perception remains among too many that smoking is and was the same as alcohol and drug abuse. The second misguided notion is that veterans (who before becoming veterans were active duty service men and women) were somehow different from their civilian contemporaries, in their ability to be immune, from the addictive nature of tobacco products.

I will not flog the same dead horse regarding this Administration's double standard on this issue. Suffice it to say that in the view of this Administration, any American except a veteran is entitled to government compensation for his or her smoking related illness through Medicare.

Veterans, on the other hand, should have known better and refrained from smoking all those free cigarettes in their "C" and "K" rations after a long and grueling day of combat.

To make a bad situation even worse, the FY '99 VA budget includes projected \$17 billion in savings should VA be allowed to deny

payment of these tobacco claims. The Congressional Budget Office (CBO) projects a savings of \$10 billion. The minority on this committee estimates \$2 billion. No matter whose figures one uses, everyone on Capitol Hill wants it for his or her own pet project. And this, Mr. Chairman, is the real disgrace. Deserving veterans will be denied their long overdue compensation so that political correctness and perhaps a road building constituency can be better served.

Smoking cigarettes and other tobacco products has never been a prohibited practice in the military nor in civilian life. If one segment of our society is entitled to proper compensation for its tobacco related-illnesses, why is another relegated to second class status and left begging at the gates for its fair share?

AMVETS repeats its call for VA to become a participant in the tobacco talks to assure that all veterans, who are first of all citizens, are equal partners in any settlement that is arrived at. More importantly, we urge VA to abandon its use of the \$17 billion smoke and mirror "savings", and return to its original mission of providing care to those who honorably served this nation when called.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions you or any members of the committee may have.

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